DOCKET

No. 08-651
Title: Jose Padilla, Petitioner
v.
Kentucky
Docketed: November 18, 2008
Lower Ct: Supreme Court of Kentucky
Case Nos.: (2006-SC-000321-DG)
Decision Date: January 24, 2008
Rehearing Denied: June 19, 2008
Questions Presented

Date	Proceedings and Orders
Sep 8 2008	Application (08A235) to extend the time to file a petition for a writ of certiorari from September 17, 2008 to November 16, 2008, submitted to Justice Stevens.
Sep 16 2008	Application (08A235) granted by Justice Stevens extending the time to file until November 16, 2008.
Nov 14 2008	Petition for a writ of certiorari filed. (Response due December 18, 2008)
Dec 11 2008	Waiver of right of respondent Kentucky to respond filed.
Dec 17 2008	DISTRIBUTED for Conference of January 9, 2009.
Dec 18 2008	Response Requested . (Due January 21, 2009)
Jan 16 2009	Order extending time to file response to petition to and including January 23, 2009.
Jan 21 2009	Brief of respondent Kentucky in opposition filed.
Jan 21 2009	Brief amici curiae of Criminal and Immigration Law Professors, et al. filed.
Feb 3 2009	Reply of petitioner Jose Padilla filed.
Feb 4 2009	DISTRIBUTED for Conference of February 20, 2009.
Feb 23 2009	Petition GRANTED.
Mar 12 2009	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including May 26, 2009.
May 21 2009	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the petitioner.
May 26 2009	Joint appendix filed. Statement of costs received.
May 26 2009	Brief of petitioner Jose Padilla filed.
Jun 2 2009	Brief amici curiae of Legal Ethics, Criminal Procedure, and Criminal Law Professors filed.
Jun 2 2009	Brief amicus curiae of American Bar Association filed.
Jun 2 2009	Brief amicus curiae of Constitutional Accountability Center filed.
Jun 2 2009	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
Jun 2 2009	Brief amici curiae of Asian American Justice Center, et al. filed.
Jun 5 2009	The time within which to file respondent's brief on the merits is extended to and including August 10, 2009.
Jul 16 2009	SET FOR ARGUMENT ON Tuesday, October 13, 2009.
Jul 17 2009	CIRCULATED.
Jul 29 2009	Record received from Supreme Court of Kentucky.
Aug 6 2009	Record received from Hardin County Circuit Court of Kentucky. (1 envelope including 2

	VHS tapes)
Aug 6 2009	Record received from Court of Appeals of Kentucky. (1 envelope)
Aug 10 2009	Brief of respondent Kentucky filed. (Distributed)
Aug 17 2009	Brief amicus curiae of United States filed. (Distributed)
Aug 17 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Aug 17 2009	Brief amici curiae of Louisiana, et al. filed. (Distributed)
Sep 4 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Sep 9 2009	Reply of petitioner Jose Padilla filed. (Distributed)
Oct 13 2009	Argued. For petitioner: Stephen B. Kinnaird, Washington, D.C. For respondent: Wm. Robert Long, Jr., Assistant Attorney General, Frankfort, Ky.; and Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)

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PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
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08-651 NOV 14 2008

No: _____

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In the
Supreme Court of the United States

Jose Padilla,
Petitioner,

v.

Commonwealth of Kentucky,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Kentucky

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner, who has lived in this country for nearly 40 years and served in the United States Army, is a legal permanent resident of this country, not a citizen. In 2001 Petitioner was indicted for trafficking in marijuana – an offense designated as an "aggravated felony" under the Immigration and Naturalization Act (INA). Prior to entering a plea of guilty to that offense, Petitioner was incorrectly advised by his counsel that the plea would not affect his immigration status. Unfortunately, because the offense was an aggravated felony, Petitioner's deportation is mandatory. Upon discovery of this fact, Petitioner sought post conviction relief in Kentucky's state courts arguing that his attorney had improperly advised him. The Supreme Court of Kentucky denied post conviction relief holding the Petitioner was not entitled to accurate advice from his attorney on immigration consequences because he had no Sixth Amendment right to counsel in that proceeding. Petitioner now seeks certiorari to review the following questions:

1. Whether the mandatory deportation consequences that stem from a plea to trafficking in marijuana, an "aggravated felony" under the INA, is a "collateral consequence" of a criminal conviction which relieves counsel from any affirmative duty to investigate and advise; and

2. Assuming immigration consequences are "collateral", whether counsel's gross misadvice as to the collateral consequence of deportation can constitute a ground for setting aside a guilty plea which was induced by that faulty advice.

LIST OF PARTIES

Pursuant to Supreme Court Rule 24.1(b), the following list identifies all of the parties before the Supreme Court of Kentucky.

Jose Padilla was the Appellee below and he is the Petitioner in this action. The Commonwealth of Kentucky was the Appellant below and is the Respondent in this action.

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OPINIONS BELOW

The opinion of the Kentucky Supreme Court is reported in *Commonwealth v. Padilla*, 253 S.W.3d 482 (Ky. 2008) and reprinted to the Appendix hereto, pp. 19-27. The Order denying rehearing was not reported and is reprinted to the Appendix hereto pp. 28. The opinion of the Kentucky Court of Appeals was initially designated as "To be Published" but was never reported. It is attached to the Appendix hereto, pp. 29-40. The Order by the Circuit Court was not reported and is reprinted to the Appendix hereto, pp. 41-44.

JURISDICTION

28 U.S.C. § 1257(a) gives this court jurisdiction to review "Final judgments or decrees rendered by the highest court of a State in which a decision could be had . . .." In this case, Kentucky's highest court has been presented with these issues and rendered an opinion on January 24, 2008. It then denied a "Petition for Rehearing" on the matters contained in this Petition on June 19, 2008. A timely application for an extension of time within to file a petition for writ of certiorari was filed with this Court. On September 16, 2008 Justice Stevens extended the time for filing the writ to and including November 16, 2008.

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment VI, provides in pertinent part that:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

The United States Constitution, Amendment XIV, § 1, provides in pertinent part that:

> No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Petitioner, Jose Padilla, is a native of Honduras who served in the United States Armed Forces during the Vietnam conflict, but never became a United States Citizen, though he remained in the country as a legal permanent resident. In 2001 Petitioner was issued a valid Commercial Drivers License by the State of Nevada, which he used to haul freight in a truck he owned an operated.

In September 2001, Petitioner allegedly agreed to haul almost 1000 pounds of marijuana – a process that took him through Hardin County, Kentucky. His cargo was discovered at a weigh station in Kentucky and he was arrested.

After Petitioner was arrested, the Immigration and Naturalization Service (INS)

lodged a detainer against him stating, "investigation has been initiated to determine whether this person is subject to removal from the United States." This was apparently interpreted to mean that the INS regarded Petitioner as an illegal alien, and on that basis, the district court held him without bond. Bond was reinstated when Petitioner was indicted, and his immigration status was never discussed in the circuit court proceedings in the case.

Petitioner was indicted by the Hardin County Grand Jury for misdemeanor possession of marijuana; misdemeanor possession of drug paraphernalia; felony trafficking in marijuana, more than five pounds; and failing to have a weight and distance tax number (i.e., KYU number) on his truck. Petitioner, represented by counsel, moved to enter a guilty plea to the three drug charges for a sentence of five years incarceration followed by five years probated. The tax violation charge was dismissed as part of the plea. During the course of the discussions on the plea, Petitioner's attorney advised him that he "did not have to worry about immigration status since he had been in this country so long." The language of the agreed upon plea and sentence did nothing to dispel Petitioner's belief that his immigration status would not be effected by the plea. In fact, one of the conditions of the probated sentence was that Petitioner "Remain within the County and State specifically approved by the Probation and Parole office in Hardin County, Kentucky, in their sole discretion, subject to modification by subsequent order of this Court."

Shortly after the plea was entered, Petitioner was served with an immigration detainer which had

been lodged by the prison. Subsequently, Petitioner filed a *pro se* motion to vacate his plea, based upon his attorney's gross misadvise to him about the immigration consequences of pleading guilty. He also filed a motion for an evidentiary hearing and for appointment of counsel. The trial court denied the motion, noting that in light of the district court's denial of bond:

> . . . from the very beginning of this case Padilla would have been aware of the possibility of deportation. In his own motion, Padilla does not state that his counsel did not discuss this issue with him. Padilla affirmatively states that his attorney commented on the matter and indicated that Padilla 'did not have to worry about immigration status since he had been in the country so long.'
>
> Padilla's counsel does not make a deportation decision, and neither does this Court. This record indicates that Padilla was aware of the possibility that he could be deported. Padilla cannot show ineffective assistance of counsel merely because of a statement of opinion on whether the Immigration and Naturalization Service would choose to deport Padilla given his length of time in the United States.

Appendix pp. 43-44. Accordingly, Petitioner's motion was denied.

Petitioner appealed the Circuit Court's decision to the Kentucky Court of Appeals.

While Petitioner's appeal was pending in the Kentucky Court of Appeals, the Supreme Court of Kentucky decided *Fuartado v. Commonwealth*, 170 S.W.3d 384 (Ky. 2005) holding that an attorney had no duty to advise their client about the immigration consequences of a guilty plea. The Court of Appeals, however, distinguished Petitioner's case from *Fuartado* on the grounds that Petitioner's case involved affirmative misadvice with regard to the consequences of the plea. Noting the clear consensus among other jurisdictions that an affirmative misstatement regarding deportation may constitute ineffective assistance of counsel, the Court of Appeals found:

> The record does not refute [Padilla's] allegation that counsel affirmatively assured him he would not be deported as a result of pleading guilty; nor does it refute his claim that but for counsel's mistaken advice, he would not have pled guilty. We are persuaded that counsel's wrong advice regarding deportation could constitute ineffective assistance of counsel pursuant to *Sparks* [*v. Sowders*, 852 F.2d 882, 885 (6th Cir. 1988)]. Thus, as there are relevant and substantial issues of fact that cannot be resolved by an examination of the record, we conclude that Padilla is entitled to an evidentiary hearing on his motion. *See*,

> *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001).

Appendix pp. 36. Accordingly, the Court of Appeals reversed the decision of the Circuit Court and remanded the claim back to the Circuit Court for an evidentiary hearing.

The Commonwealth sought discretionary review before the Supreme Court of Kentucky, which was granted. Briefs were filed wherein Petitioner argued that the concept of "flagrant misadvice" had been widely accepted across the nation as a grounds for setting aside a guilty plea where an attorney's misstatement on a collateral matter induced the defendant to plead guilty in error, and that Kentucky's lower courts had long adhered to that concept. Petitioner further argued that *Fuartado* should not apply to cases involving an aggravated felony, when the consequence of the plea was mandatory deportation, noting that some jurisdictions had concluded that deportation consequences should no longer be regarded as "collateral" to the plea.

Without hearing arguments, the Supreme Court of Kentucky rendered a brief decision concluding that,

> . . . our unequivocal holding in *Fuartado* leaves [Padilla] without a remedy [in Kentucky post-conviction procedures.] As collateral consequences are outside the scope of the guarantee of the Sixth Amendment right to counsel, it follows that

> counsel's failure to advice [Padilla] of such collateral issue or his act of advising [Padilla] incorrectly provides no basis for relief. In neither instance is the matter required to be addressed by counsel, and so an attorney's failure in that regard cannot constitute ineffectiveness entitling a criminal defendant to relief under *Strickland v. Washington.*

Commonwealth. v. Padilla, 253 S.W.3d 482 (Ky. 2008); Appendix pp. 23.

Petitioner filed a petition for rehearing, which was denied by summary order (Appendix pp. 11)

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A NATIONWIDE SPLIT OF AUTHORITY AS TO THE DUTY, IF ANY, OF COUNSEL TO CORRECTLY ADVISE A NON-CITIZEN DEFENDANT ON THE IMMIGRATION CONSEQUENCES ASSOCIATED WITH A CRIMINAL CONVICTION

The decision by the Supreme Court of Kentucky created further conflict of authority on critical issues of federal law, namely (1) whether the mandatory deportation associated with a plea to an "aggravated felony" under the Immigration and Nationalization Act (INA) can still be described as a "collateral consequence" of a criminal conviction which relieves counsel from any affirmative duty to advise; and (2) whether an attorney's "flagrant" or

"gross" misadvice on a collateral matter, such as mandatory deportation, can constitute grounds for setting aside the guilty plea. These are issues of significant importance both to the immigrant community and the defense bar. Both issues have been thoroughly developed and litigated in the lower courts for many years, and are ripe for a final resolution by this Court.

A. Due to Significant Changes in Immigration Law, Proper Advice on the Impact of a Criminal Conviction on a Defendant's Legal Status is a Matter of Great Importance to Non-Citizen Defendants.

For most of the history of immigration law, deportation was a possible but not an inevitable consequence of a criminal conviction. As early as 1917, Congress stated its belief that deportation was an additional punishment for a crime, and gave sentencing courts the power to prohibit deportation in order "to make the total penalty for the crime less harsh and less severe when deportation would appear to be unjust."[1] Some Courts during this period even found that the Sixth Amendment right to counsel applied the hearing to determine whether or not to make such a recommendation.[2]

Congress eliminated the power of the court to recommend against deportation in 1990.[3] In 1996,

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[1] *See*, former 8 U.S.C. § 1251(b)(1988)(finding that deportation provisions shall not apply if "the court sentencing such alien for such crimes shall make . . . a recommendation to the Attorney General that such alien not be deported); 53 Cong.Rec. 5169-74 (1917).

[2] *See, e.g., Janvier v. United States*, 793 F.2d 449, 455 (2nd Cir. 1986).

[3] Pub. L. 101-649 § 505.

the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and the Anti-terrorism and Effective Death Penalty Act (AEDPA) together imposed a requirement of mandatory deportation for certain "aggravated felony" offenses. Said requirement could not be cancelled by the Attorney General for any reason – even if the immigrant could make a compelling case for asylum.[4]

These new consequences often turn on highly technical distinctions which an untrained attorney or *pro se* defendant would probably not be aware. For example, a plea to a drug possession charge in Kentucky is not treated as an "aggravated felony" under federal law.[5] However, a plea in state court to a trafficking charge is an "aggravated felony" under immigration law.[6]

In the instant case, Petitioner's counsel failed to appreciate the fact that Petitioner was pleading guilty to an aggravated felony for which deportation was mandatory, and misadvised Petitioner as to the deportation consequences of his plea. As a consequence, by pleading guilty to the offense of trafficking in marijuana, Petitioner was also unwittingly sentencing himself to a lifetime exile from this country.

Unfortunately, Petitioner is not alone in making this mistake. The result of the changes in

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[4] *Lopez v. Gonzalez*, 549 U.S. 47 (2006).

[5] *United States v. Palacios-Suarez*, 418 F.3d 692 (6th Cir. 2005).

[6] *Lopez v. Gonzales*, supra

immigration law has created something of a humanitarian crisis within the criminal justice system. One commentator has noted that from 1984 to 2002 there was a 71-fold increase in the number of deportations, so that today "over eighty thousand [non-citizens] plead guilty to deportable offenses."[7] These cases often involve individuals who moved to this country when they were extremely young, and may have had no idea that by pleading guilty they were sentencing themselves to permanent exile.[8]

As noted below, this crisis has provoked a number of different responses in the state and federal courts. Given the significance of this issue, it is important for this court to accept review and resolve the question of whether there is any duty on the part of counsel to ensure that non-citizen defendants are aware of the possibility (or in many cases, certainty) of deportation when they enter a plea in a criminal case.

B. State and Federal Courts Have Split on the Issue of What Advice Counsel Must Give to a Non-Citizen Defendant in a Criminal Case.

As this Court is well aware, where a defendant challenges a guilty plea based on ineffective assistance of counsel, he must display that his counsel made errors outside the wide range of professionally competent assistance, and that the deficient performance so seriously affected the outcome of the plea process that, but for the errors

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[7] Molina, Sarah Keefe, *Rejecting the Collateral Consequence Doctrine: Silence About Deportation May or May Not Violate Strickland's Performance Prong*, 51 St.Louis U.L.J 267, 269 (2006).

[8] *Id.*

of counsel, there is a reasonable probability that the defendant would not have pled guilty, but would have insisted on going to trial.[9] Generally speaking, failure to advise a client of an indirect or "collateral" consequence of the plea will not constitute ineffective assistance of counsel. The problem arises where, as here, counsel volunteers advice – often in response to questioning by the client – which turns out to be incorrect. In the context of immigration cases, the responses of the lower courts can be divided into three groups: those which find that flagrant misadvice is a basis for vacating a guilty plea; those which find that deportation consequences are not collateral, and therefore proper advice is required as part of the plea; and Kentucky, which is apparently content to affirm a plea based on flagrantly incorrect advice, so long as the advice does not touch directly on the sentence imposed.

Some Jurisdictions Will Only Reach the Issue if the Attorney Has Volunteered Incorrect Advice: In *Strader v. Garrison*,[10] the Fourth Circuit considered a case where the defendant was induced by his own attorney to accept a plea based on misinformation with regard to parole eligibility. The Fourth Circuit refused to hold that the defendant was bound to the plea merely because the issue of parole eligibility – which was clearly of importance to the defendant – was deemed "collateral." Rather, the Fourth Circuit held:

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[9] *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970); *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 208 (1985).

[10] *Strader v. Garrison*, 611 F.2d 61 (4th Cir. 1979)

> Here, though parole eligibility dates are collateral consequences of the entry of a guilty plea of which a defendant need not be informed if he does not inquire, when he is grossly misinformed about it by his lawyer, and relies upon that misinformation, he is deprived of his constitutional right to counsel. When the erroneous advice induces the plea, permitting him to start over again is the imperative remedy for the constitutional deprivation.[11]

From the time of *Strader*, until the present case, all jurisdictions that have considered the question have also concluded that even though the subject was a "collateral" matter for which the defendant was not entitled to representation – such as deportation, parole eligibility, suspension of driving privileges, etc. – flagrant misadvice by counsel may constitute ineffective assistance which renders the plea involuntary.[12] This is not an

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[11] *Id.*, at 65.

[12] *Patterson v. State*, 879 So.2d 1208, 1210 (Ala.Crim.App. 2003); *People v. Soriano*, 194 Cal.App.3d 1470, 240 Cal.Rptr. 328 (1987); *People v. Garcia*, 815 P.2d 937 (Colo. 1991); *Hernandez v. Commissioner of Correction*, 846 A.2d 889 (Conn.Ct.App. 2004); *Roberti v. State*, 782 So.2d 919, 920 (Fla.Dist.Ct.App. 2001); *Rollins v. State*, 591 S.E.2d 796 (Ga. 2004); *People v. Correa*, 485 N.E.2d 307 (Ill.1985); *Meier v. State*, 337 N.W.2d 204, 207 (Iowa 1983); *Aldus v. State*, 748 A.3d 463 (Me. 2000); *Yoswick v. State*, 700 A.2d 251, 256, 347 Md. 228, 240 (Md. 1997); *Bronson v. State*, 786 So.2d 1083 (Miss.Ct.App. 2001); *Pettis v. State*, 212 S.W.3d 189, 194 (Mo.Ct.App. 2007); *State v. Sharkey*, 155 N.H. 638, 927 A.2d 519 (N.H. 2007); *State v. Viera*, 760 A.2d 840 (N.J.Super.Ct. 2000); *People v. Ping Cheung*, 186 Misc.2d 507, 718 N.Y.S.2d

isolated ruling, but is apparently the rule in every Federal circuit, the District of Columbia, and twenty-one states.

Further, in many jurisdictions, the "flagrant misadvice" theory may provide a basis for vacating a plea when the subject of the misadvice is deportation resulting from the guilty plea.[13] The basis for the exception is that while counsel has the option of simply refusing to answer a defendant's inquiries on collateral matters, he has a duty to refrain from offering mistaken advice on those matters.[14]

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578 (N.Y.Sup. 2000); *State v. Goforth*, 503 S.E.2d 676, 678, 130 N.C.App. 603, 604 (N.C.App. 1998); *Gonzalez v. Oregon*, 83 P.3d 921 (Or. 2004); *Hinson v. State*, 297 S.C. 456, 377 S.E.2d 338 (1989); *King v. State*, 2007 WL 3052854 (Tenn.Crim.App. 2007); *State v. Rojas-Martinez*, 125 P.3d 930 (Utah, 2005); *Commonwealth v. Tahmas*, 2005 WL 2249587 (Va.Cir.Ct., 2005); *Matter of Peters*, 50 Wash.App. 702, 750 P.2d 643 (1988); *Goodall v. United States*, 759 A.2d 1077 (D.C. 2000); *Cepulonis v. Ponte*, 699 F.2d 573, 577 (1st Cir. 1983); *United States v. Cuoto*, 311 F.3d 179 (2nd Cir. 2002); *Meyers v. Gillis*, 142 F.3d 664 (3rd Cir. 1998); *O'Tuel v. Osborne*, 706 F.2d 498, 500-01 (4th Cir. 1983); *Czere v. Butler*, 833 F.2d 59, 63 n. 6 (5th Cir. 1987): *Sparks v. Sowders*, 852 F.2d 882, 885 (6th Cir. 1988); *Hill v. Lockhart*, 894 F.2d 1009 (8th Cir. 1990); *United States v. Kwan*, 407 F.3d 1005 (9th Cir. 2005); *Beavers v. Saffle*, 216 F.3d 918 (10th Cir. 2000); *Downs-Morgan v. United States*, 765 F.2d 1534 (11th Cir. 1985).

[13] *State v. Rojas-Marinez*, 125 P.3d 930 (Utah, 2005); *United States v. Kwan*, 407 F.3d 1005 (9th Cir. 2005); *Gonzalez v. Oregon*, 83 P.3d 921 (Or. 2004), *United States v. Cuoto*, 311 F.3d 179 (2nd Cir. 2002); *Roberti v. State*, 782 So.2d 919, 920 (Fla.Dist.Ct.App. 2001); *United States v. Mora-Gomez*, 875 F.Supp. 1208 (E.D.Va., 1995); *People v. Soriano*, 194 Cal.App.3d 1470, 240 Cal.Rptr. 328 (1987); *Downs-Morgan v. United States*, 765 F.2d 1534 (11th Cir. 1985); *People v. Correa*, 485 N.E.2d 307 (Ill.1985)

[14] *Kwan, supra* at 1015.

Some Jurisdictions Require that Attorneys Affirmatively Advise Their Clients on the Immigration Consequences of a Guilty Plea: Recent changes to immigration law have prompted at least one commentator to note that characterizing immigration consequences as merely "collateral" is a simply a "judicially created myth."[15] Further, several courts have required advice on the immigration consequences of a guilty plea.[16] Federal circuits apparently have begun to speculate about whether they should do the same, noting that "[o]n its face, [the] argument [that automatic deportation is a direct rather than a collateral consequence] is persuasive, and we believe that it deserves careful consideration."[17] Indeed, commentators have observed that the harsh reality of deportation has led some courts to construe the "flagrant misadvice" exception so broadly that it amounts to rejection of the collateral consequence doctrine.[18]

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[15] Taylor, Margaret H., and Wright, Ronald F., *The Sentencing Judge as Immigration Judge*, 51 Emory L.J. 1131, 1137 (2002).

[16] See *People v. Pozo*, 712 P.2d 1044, 1046-47 (Colo. App. 1985), *rev'd on other grounds*, (en banc), 746 P.2d 523 (1987); *Williams v. State*, 641 NE.2d 44, 48-49 (Ind. 1994)

[17] *See, e.g., Cuoto, supra* at 189-191

[18] Justman, Rob A., *The Effects of AEDPA and IIRIRA on Ineffective Assistance of Counsel Claims for Failure to Advise Alien Defendants of Deportation Consequences of Pleading Guilty to an "Aggravated Felony"* 2004 Utah L.R. 701 (2004); *see also* Molina, *supra*; Atkins, Taylor, *Immigration Consequences of Guilty Pleas, What State v. Paredez Means to New Mexico Criminal Defendants and Defense Attorneys* 36 N.M. L.Rev. 603 (2006); Francis, John J., *Failure to Advise Non-Citizens of Immigration Consequences of Criminal*

The Kentucky Rule – Erroneous Advice of Counsel with Regard to a Collateral Consequence of a Conviction is Never a Basis to Set Aside a Plea: In the Petitioner's case, Kentucky created a new rule which has not been embraced by any jurisdiction of which the undersigned is aware; specifically, that misadvice on any issue deemed "collateral" to the plea – everything from mandatory deportation, as in this case, to parole consequences – cannot provide a basis for vacating a guilty plea. The basis for the Court's conclusion is a hypertechnical reading of this Court's ineffective assistance of counsel jurisprudence. In effect, the Supreme Court of Kentucky has ruled that where a defendant is induced to plead guilty by his attorney's flagrantly incorrect advice, that plea will stand if the issue on which the attorney offered the advice is deemed "collateral." The consequences of this rule are extraordinary: a Kentucky lawyer can induce his or her client to plead guilty through deception or outright incompetence related to a "collateral" matter without undermining the validity of the plea.

C. The Aforementioned Issues have been Thoroughly Litigated in the Lower Courts Resulting in Conflicts in Authority that are Squarely Presented by This Case

As noted and described in more detail above, 21 states and all the Federal Circuits have addressed the issues presented by this case, resulting several significant splits of authority. These courts require

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Convictions: Should This Be Grounds to Withdraw a Guilty Plea, 36 U.Mich. J.L.Reform 691 (2003).

the guidance of this Court to finally resolve the important questions presented by this case.

II. REVIEW BY THIS COURT IS NEEDED BECAUSE THE STATE COURT OF LAST RESORT IN KENTUCKY HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH OTHER STATE COURTS OF LAST RESORT AND THE FEDERAL COURTS.

The Supreme Court of Kentucky has held that counsel's gross misadvice as to a collateral consequence of a guilty plea, in this case mandatory deportation, cannot constitute ineffective assistance of counsel entitling a defendant to relief under *Strickland v. Washington* since collateral consequences of a guilty plea are outside the scope of the guarantee of the Sixth Amendment right to counsel. The Supreme Court of Kentucky's holding stands in direct conflict with apparently all other jurisdictions that have addressed the issue. This Court has the authority to review and correct the Supreme Court of Kentucky's deeply flawed analysis of the Sixth Amendment right to Counsel. This Court should exercise that authority. The Petitioner in this case, due to the Supreme Court of Kentucky's clear misunderstanding of the parameters of the Sixth Amendment, faces certain deportation from the country he has served and has called home for almost 40 years. At a minimum, this case is ripe for, and this Court should consider, granting summary reversal of the decision of the Supreme Court of Kentucky.

CONCLUSION

For the foregoing reasons, this court should grant this writ of certiorari. The Court may wish to consider summary reversal of the decision by the Supreme Court of Kentucky.

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APPENDIX

RENDERED: JANUARY 24, 2008
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

2006-SC-000321-DG

COMMONWEALTH OF KENTUCKY — APPELLANT

ON REVIEW FROM THE COURT OF APPEALS
v. CASE NUMBER 2004-CA-001081
HARDIN CIRCUIT COURT
NO. 01-CR-000517

JOSE R. PADILLA — APPELLEE

OPINION OF THE COURT BY CHIEF JUSTICE LAMBERT

REVERSING

This Court granted the Commonwealth's motion for discretionary review. It seeks reversal of the Court of Appeals opinion remanding to the trial court for an evidentiary hearing on Appellee's ineffective assistance of counsel claim pursuant to RCr 11.42.

Appellee Jose Padilla is a native of Honduras who has lived in this country for decades. He served in the United States military during the Vietnam War. Petitioner was indicted by the Hardin County Grand Jury for trafficking in more than five pounds of marijuana, possession of marijuana, possession of

drug paraphernalia, and operating a tractor/trailer without a weight and distance tax number. Padilla, represented by counsel, moved to enter a guilty plea to the three drug-related charges, in exchange for dismissal of the remaining charge, and a total sentence of ten years on all charges. The plea agreement provided that Padilla would serve five years of his ten year sentence, and would be sentenced to probation for the remaining five years. Final judgment was entered October 4, 2002.

On August 18, 2004, Padilla filed an RCr 11.42 motion for post-conviction relief alleging that his attorney was ineffective in misadvising him about the potential for deportation as a consequence of his guilty plea. Padilla alleged that his counsel told him that he "did not have to worry about immigration status since he had been in the country so long." The Hardin Circuit Court denied the RCr 11.42 motion on the basis that a valid guilty plea does not require that the defendant be informed of every possible consequence of a guilty plea. It reasoned that since Appellee's bond was changed because he was suspected of being an illegal alien, he was aware of the possibility of deportation, and the court noted that counsel did discuss the issue with him. The court concluded that: "Padilla's counsel does not make a deportation decision and neither does this Court."

On appeal, the Court of Appeals reversed the decision of the Hardin Circuit Court and remanded the case for an evidentiary hearing. The Court of Appeals had the benefit of this Court's recent decision in *Commonwealth v. Fuartado,*(fn1) which determined that collateral consequences are outside

the scope of representation required by the Sixth Amendment and that failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel. However, the majority of the Court of Appeals panel found this case distinguishable from that unequivocal holding in *Fuartado.* The Court of Appeals held that although collateral consequences do not have to be advised, "an affirmative act of 'gross misadvice' relating to collateral matters can justify post-conviction relief." (fn2) The Court of Appeals concluded that counsel's wrong advice in the trial court regarding deportation could constitute ineffective assistance of counsel. It remanded Appellee's case to the trial court for an evidentiary hearing on his motion for RCr 11.42 relief.

The Commonwealth argues that the Court of Appeals erred in distinguishing this case from *Fuartado,* because the legal premise in that case was that deportation is a collateral consequence of the criminal conviction. The Commonwealth argues that, whether as the result of misadvice or the failure to advise, deportation is necessarily collateral and not meaningfully distinguishable from other consequences such as losing the right to vote or to possess firearms. The Commonwealth argues that the defendant's understanding or misunderstanding of collateral matters is not implicated with respect to the waiver of constitutional rights upon entering a guilty plea.

Appellee responds that the Commonwealth fails to recognize that although most courts follow the collateral consequences rule, there is generally an

exception for erroneous advice on collateral consequences as opposed to no advice. Additionally, Appellee disputes the Commonwealth's assertion that he is not facing deportation as a result of the plea in this case, but because he is an illegal alien. Appellee insists there is nothing in the record to substantiate that claim by the Commonwealth, but the record instead shows that he was living in this country as a legal permanent resident even though he had not obtained American citizenship. Petitioner points to his valid Nevada driver's license, his valid social security number, and his service in the United States military during the Vietnam War. Padilla argues for a presumption of validity regarding his immigration status given the evidence he points to in the record.

Appellee argues that relief is warranted on the basis of ineffective assistance because his plea was substantially induced by his attorney's mistaken advice regarding his immigration status. He argues that under *Strickland v. Washington,*(fn3) he cannot be bound to such a plea, and cites *Sparks v. Sowders* (fn4) as authorizing this result. In *Sparks,* the United States Court of Appeals for the Sixth Circuit held that "gross misadvice" concerning parole eligibility can amount to ineffective assistance of counsel. Sparks relied on *Strader v. Garrison,*(fn5) which had determined that even though parole eligibility is a collateral consequence of the guilty plea which an attorney does not have to inform his client of, once an accused does inquire about it, it may constitute ineffective assistance of counsel if he is misinformed about it and the erroneous advice induces the plea.

Thus, in some courts a rule has emerged that an attorney who offers grossly erroneous advice to a defendant which is material in inducing a guilty plea may have rendered ineffective assistance of counsel.(fn6) Appellee correctly asserts that a number of jurisdictions which have held that failure to advise of a collateral matter is not ineffective assistance have nevertheless held that there is an exception for cases where the attorney misadvised the defendant on the consequences of his plea with regard to immigration. (fn7)

We conclude that our unequivocal holding in *Fuartado* leaves Appellee without a remedy pursuant to RCr 11.42. As collateral consequences are outside the scope of the guarantee of the Sixth Amendment right to counsel, it follows that counsel's failure to advise Appellee of such collateral issue or his act of advising Appellee incorrectly provides no basis for relief. In neither instance is the matter required to be addressed by counsel, and so an attorney's failure in that regard cannot constitute ineffectiveness entitling a criminal defendant to relief under *Strickland v. Washington*. Accordingly, we reverse the Court of Appeals and reinstate the final judgment of the Hardin Circuit Court denying RCr 11.42 relief.

All sitting. LAMBERT, C.J., and ABRAMSON, MINTON, NOBLE and SCOTT, JJ., concur.

CUNNINGHAM, J., dissents by separate opinion in which SCHRODER, J., joins.

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RENDERED: JANUARY 24, 2008
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SUPREME COURT OF KENTUCKY

2006-SC-000321-DG

COMMONWEALTH OF KENTUCKY — APPELLANT

ON REVIEW FROM THE COURT OF APPEALS
v. CASE NUMBER 2004-CA-001081
HARDIN CIRCUIT COURT
NO. 01-CR-000517

JOSE R. PADILLA — APPELLEE

DISSENTING OPINION BY JUSTICE CUNNINGHAM.

I respectfully dissent from the excellent writing of our distinguished Chief Justice.

I believe *Commonwealth v. Fuartado* is distinguishable in a small, but critical way from the case before us. In that case, the Court of Appeals concluded that a defense lawyer has no affirmative duty to inform his or her client of the impact that a guilty plea will have on civil immigration status. I fully agree.

In this case, however, if Appellee's claim is to be believed -- a prospect still looming because no

hearing was held -- he specifically inquired of his counsel about this very important matter. Appellee had been in the United States for decades and had even served this country in Vietnam. Again, it is Appellee's contention that his counsel gave him terribly wrong advice. The majority states that the matter of deportation is "not a matter required to be addressed by counsel." Again, I fully agree. But here, Appellee raised the issue himself. Counsel could have just as easily, and responsibly, responded that he did not know the answer. Counsel who gives erroneous advice to a client which influences a felony conviction is worse than no lawyer at all. Common sense dictates that such deficient lawyering goes to effectiveness. The allegations made by Appellee may not be credible. But he was at least entitled to a hearing. I do not believe it is too much of a burden to place on our defense bar the duty to say, "I do not know." Accordingly, I would reverse and remand for a hearing.

SCHRODER, J., joins this dissenting opinion.

Footnotes:

FN1. 170 S.W.3d 384 (Ky.2005).

FN2. The court relied on *Sparks v. Sowders,* 852 F.2d 882, 885 (6th Cir.1988).

FN3. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

FN4. 852 F.2d 882 (6th Cir.1988).

FN5. 611 F.2d 61, 65 (4th Cir. 1979).

FN6. See, e.g., *Cepulonis v. Ponte,* 699 F.2d 573, 577 (1st Cir. 1983) (although defendant need not be informed of the details of his parole eligibility, "misinformation may be more vulnerable to constitutional challenge than mere lack of information"); *Strader v. Garrison,* 611 F.2d 61 at 65; *Sparks v. Sowders,* 852 F.2d at 885.

FN7. *State v. Rojas-Martinez,* 125 P.3d 930, 935 (Utah 2005); *United States v. Kwan,* 407 F.3d 1005 (9th Cir.2005); *Gonzalez v. State,* 191 Or.App. 587, 83 P.3d 921 (2004); *United States v. Couto,* 311 F.3d 179 (2d Cir.2002); *Downs-Morgan v. United States,* 765 F.2d 1534, 1539-41 (11th Cir. 1985).

SUPREME COURT OF KENTUCKY

2006-SC-000321-DG

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

ON REVIEW FROM THE COURT OF APPEALS
CASE NUMBER 2004-CA-001981
HARDIN CIRCUIT COURT
NO. 01-CR-000517

JOSE R. PADILLA — APPELLEE

ORDER DENYING PETITION FOR REHEARING

The petition for rehearing filed by Appellee Jose R. Padilla is DENIED.

All sitting. Lambert, C.J., Minton, Noble, and Scott, JJ., concur. Abramson, Cunningham, and Schroder, JJ., would Grant petition for rehearing.

Entered: June 19, 2008.

/S/ C.J. LAMBERT
CHIEF JUSTICE

RENDERED: MARCH 31, 2006; 10:00 A.M.
TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

NO. 2004-CA-001981-MR

JOSE R. PADILLA — APPELLANT

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY M. EASTON, JUDGE
ACTION NO. 01-CR-00517

v.

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DYCHE AND HENRY, JUDGES.

COMBS, CHIEF JUDGE: Jose Padilla appeals from an order of the Hardin Circuit Court of September 14, 2004, denying his motion for post-conviction relief pursuant to RCr[1] 11.42. Padilla argues that he was entitled to an evidentiary hearing

[1] Kentucky Rules of Criminal Procedure.

on his motion claiming ineffective assistance of counsel. After a review of the record and the applicable authorities, we remand this matter to the trial court for further consideration.

On October 31, 2001, Padilla was indicted on charges of possession of marijuana, possession of drug paraphernalia, trafficking in marijuana (including an amount greater than five pounds) and operating a truck without a weight and distance tax number. Pursuant to a plea agreement, Padilla pled guilty to all three drug-related charges on August 22, 2002; the Commonwealth dismissed the vehicular violation. It also recommended that Padilla be sentenced to concurrent terms of twelve months each for the two possession charges and to ten years for trafficking. The agreement provided that Padilla would serve the first five years of the ten-year sentence in prison; the second five years of the sentence were to be probated. Padilla was sentenced according to the agreement on October 4, 2002.

On August 18, 2004, Padilla, *pro se*, filed a timely motion pursuant to RCr 11.42 and requested that his sentence be vacated. He alleged that he is a native of Honduras who has lived in the United States for many years. He stated that he served in the United States military during the Vietnam War and that he was honorably discharged at the conclusion of his service.

Padilla's claim of ineffective assistance of counsel focused on his attorney's representation concerning his alien status. He contended that his trial attorney failed to "investigate the possible

immigration consequences" involved in his plea of guilty; that his attorney affirmatively advised him that he "did not have to worry about immigration status since he had been in the country so long"; and that his attorney's advice was inaccurate. He alleged that he had suffered "unreasonable prejudice and consequences by the mistaken advice of counsel" and that he would have elected to go to trial if he had been properly advised. He asked for an evidentiary hearing and for appointment of counsel to assist him with the motion.

The Commonwealth did not file a response to Padilla's motion. The trial court did not appoint counsel to represent Padilla; nor did it grant an evidentiary hearing. It summarily denied Padilla's motion, holding as follows:

> Padilla's counsel does not make a deportation decision, and neither does this Court. This record indicates that Padilla was aware of the possibility that he could be deported. Padilla cannot show ineffective assistance of counsel merely because of a statement of opinion on whether the Immigration and Naturalization Service would choose to deport Padilla given his length of time in the United States.

Findings of Fact, Conclusions of Law and Order Denying RCr 11.42 Motion, at pp. 3-4.

Padilla appealed from this order, but his appeal was placed in abeyance pending the Kentucky Supreme Court's decision in

Commonwealth v. Fuartado, 170 S.W.3d 384 (Ky. 2005). In Fuartado, the Court held that a defendant was not entitled to post-conviction relief based on failure of trial counsel to investigate or advise him of possible deportation consequences of a plea:

> [A] defendant's Sixth Amendment right to counsel encompasses *criminal* prosecutions only, and does not extend to requiring counsel on collateral consequences that may result from such proceedings. *Cf. Turner v. Commonwealth*, 647 S.W.2d 500, 500-501 (Ky.App. 1982) ("A guilty plea that is brought about by a person's own free will is not less valid because he did not know all possible consequences of the plea and all possible alternative courses of action."). "[T]he Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." *Strickland v. Washington*, 466 U.S. 668, 684 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The constitutional requirement of effective assistance of counsel, therefore, extends to and encompasses only those activities which tend to protect a criminal defendant's right to a fair and intelligent determination of guilt or innocence. *See id.* At 686, 104 S.Ct. 2052 ("In giving meaning to the requirement [of effective assistance of counsel], . . . we must take its purpose

– to ensure a fair trial – as the guide."); *McMann v. Richardson*, 397 U.S. 759, 766, 90 S.Ct. 1441, 1446, 25 L.Ed.2d 763 (1970) (since a guilty plea is also a waiver of trial it is endowed with certain constitutional protections.) In cases where defendants are agreeing to plead guilty in accordance with a plea bargain, this principle of protecting a criminal defendant's right to be fairly tried and justly convicted is extended to include investigating and advising the criminal defendant on all aspects of the plea and the direct consequences thereof – such as the sufficiency of the evidence supporting the plea, the availability of substantial defenses, the loss of several fundamental constitutional rights, and the punishment that may be imposed by the trial court. *See Brady v. United States*, 397 U.S. 742, 755, 90 S.Ct. 1463, 1472, 25 L. Ed.2d 747 (1970) (defendant must be "fully aware of the direct consequences" of a guilty plea) (emphasis added); *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974) (setting forth standards for effective assistance of counsel). The existence of collateral consequences is irrelevant to the determination of a defendant's guilt or innocence and completely outside the authority or control of the trial court. Accordingly, we find, along with the majority of other courts determining the issue,

> that the Sixth Amendment requires representation encompassing only the criminal prosecution itself and the direct consequences thereof. Because the consideration of collateral consequences is outside the scope of representation required under the Sixth Amendment, failure of defense counsel to advise Appellee of potential deportation consequences was not cognizable as a claim for ineffective assistance of counsel.

Id. at p. 386 (emphasis in original).

If Padilla's claim were predicated solely on counsel's failure to investigate or to advise him of the potential for deportation, Fuartado would clearly require a resolution of his appeal in favor of the Commonwealth. Fuartado held that the validity of a defendant's guilty plea is not compromised by trial counsel's failure to render advice relating to the collateral consequences of the plea. However, it did not address Padilla's claim that his lawyer gave erroneous information concerning his risk of deportation after Padilla had made a direct inquiry. In contrast to an omission in advising a client of the collateral consequences of a plea, an affirmative act of "gross misadvice" relating to collateral matters can justify post-conviction relief. Sparks v. Sowders, 852 F.2d 882, 885 (6th Cir. 1988).

Sparks, supra, involved counsel's direct misinformation about parole eligibility. In In re Resendiz, 25 Cal.4th 230, 19 P.3d 1171, 105

Cal.Rpt.2d 431 (2001), a case cited by the Commonwealth, the court addressed erroneous advice in the context of deportation issues:

> The Attorney General, relying primarily on out-of-state and federal court decisions, urges us to announce a categorical bar to immigration-based ineffective assistance claims. For the following reasons we decline to impose such a categorical bar. Rather, we hold that affirmative misadvice regarding immigration consequences can in certain circumstances constitute ineffective assistance of counsel.
>
> . . . .
>
> As discussed, petitioner testified that counsel told him that, if he pled guilty, he would have "no problems with immigration" except that he would not be able to become a United States citizen. Even among the federal and other courts cited by the Attorney General, "the clear consensus is that an affirmative misstatement regarding deportation may constitute ineffective assistance."

Id., at p. 240 and 251, citing United States v. Mora-Gomez, 875 F. Supp. 1208, 1212 (E.D. Va. 1995); see also, Downs-Morgan v. United States, 765 F.2d 1534, 1540-41 (11th Cir. 1985).

After examining the record, the court in Resendiz ultimately determined that the defendant was not entitled to relief because he failed to

demonstrate that he was prejudiced by counsel's misinformation. The Commonwealth argues that we should also conclude as a matter of law that Padilla cannot prove that he was prejudiced as required by the second-prong of the Strickland analysis. However, the Court in Resendiz conducted an evidentiary hearing on the merits of the claim of ineffective assistance of counsel prior to issuing its ruling.

Padilla did not receive a hearing on his claim. The record does not refute his allegation that counsel affirmatively assured him he would not be deported as a result of pleading guilty; nor does it refute his claim that but for counsel's mistaken advice, he would not have pled guilty. We are persuaded that counsel's wrong advice regarding deportation could constitute ineffective assistance of counsel pursuant to Sparks, supra. Thus, as there are relevant and substantial issues of fact that cannot be resolved by an examination of the record, we conclude that Padilla is entitled to an evidentiary hearing on his motion. See, Fraser v. Commonwealth, 59 S.W.3d 448 (Ky. 2001).

The order of the Hardin Circuit Court is vacated, and this matter is remanded for further proceedings consistent with this opinion.

DYCHE, JUDGE, CONCURS.

HENRY, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

HENRY, JUDGE DISSENTING. I respectfully dissent. I would affirm the trial court

for two reasons. First, in my view the very recently decided case of Commonwealth v. Fuartado, 170 S.W.3d 384 (Ky. 2005) is controlling here. As our Supreme Court has plainly said, "[b]ecause the consideration of collateral consequences is outside the scope of representation required under the Sixth Amendment, failure of defense counsel to advise [the defendant] of potential deportation consequences was not cognizable as a claim for ineffective assistance of counsel." Id. at 386. Second, the assertion by Padilla that a statement by his defense counsel concerning his immigration status affected the voluntariness of his guilty plea is simply not credible. Long before he entered his plea, within days after his arrest, Padilla was informed that his bond was changed from $25,000.00 cash to "no bond" for the stated reason that he was "believed to be an illegal alien and is awaiting deportation by the Federal authorities." Padilla knows he is not a U.S. citizen. He cannot make a credible claim that he did not know that his immigration status could be affected by his criminal charges. The "misadvice" by his lawyer that he complains of is an alleged statement that Padilla "did not have to worry about immigration status since he had been in the country so long." Padilla does not allege that he was told that he would avoid being deported if he pleaded guilty. He has not made a showing that his deportation is imminent, or even that deportation proceedings against him have commenced. Conversely, he cannot show that he might not be deported even if he is ultimately acquitted at trial. I must agree with the Commonwealth that the possible outcomes regarding Padilla's immigration status are "speculative". Misadvice about speculative deportation consequences is not

ineffective assistance of counsel under Fuartado, and cannot render Padilla's plea involuntary within the meaning of Boykin v. Alabama.

Sparks v. Sowders, 852 F.2d 882 (6th Cir. 1988), cited by the majority in support of the proposition that "gross misadvice" about collateral matters "can justify post-conviction relief," is not persuasive authority here. In Sparks the defendant was told that he could be sentenced to life without parole if he did not accept a plea offer, when in fact Kentucky law did not provide for such a sentence at the time. Relying on the misadvice, Sparks pleaded guilty and received a thirty-five year sentence. As a result he was not eligible for parole until he served seven years. Since he was charged with non-capital murder, if he had gone to trial and received the maximum sentence of life in prison, he would have been eligible for parole after only eight years under the law in effect at the time. As Judge Kennedy stated in his concurring opinion, "[e]ligibility for parole is ordinarily only a collateral consequence of a possible sentence. In the case of a life sentence without parole, however, it is more than collateral. It is an essential and critical portion of the penalty." Id. at 886.

In the California case relied on by the majority, the California Supreme Court ultimately rejected the defendant's claim that his lawyer's misadvice about his possible deportation constituted ineffective assistance of counsel. In re Resendiz, 25 Cal.4th 230, 254, 19 P.3d 1171, 1187, 105 Cal.Rpt.2d 431, 448 (2001). In that case the defendant's lawyer told him that if he pleaded guilty "he would have 'no problems with immigration' except that he

would not be able to become a United States citizen." Id. at 25 Cal.4th 236, 19 P.3d 1175, 105 Cal.Rpt.2d 434. Although Resendiz was afforded a hearing on the question, the court rejected his contention that he would have insisted on going to trial if not for his lawyer's erroneous advice about deportation consequences. Among other things the court considered, "the probable outcome of any trial, to the extent that may be discerned." Id. at 25 Cal.4th 254, 19 P.3d 1187, 105 Cal.Rpt.2d 448. It is worth noting that California law on this issue diverges substantially from Kentucky's law; for example a California statute[19] requires courts, as part of the guilty-plea colloquy, to advise defendants that if they are not citizens, a plea of guilty "may have the consequences of deportation." Yet even the Resendiz majority noted that Resendiz's choice:

> whether to plead, even had he been properly advised, would *not* have been between, on the one hand, pleading guilty and being deported and, on the other, going to trial and avoiding deportation. While it is true that by insisting on trial petitioner would for a period have retained a theoretical possibility of evading the conviction that rendered him deportable and excludable, it is equally true that a conviction following trial would have subjected him to the same immigration consequences.

---

[19] California Penal Code Section 1016.5.

Id. (emphasis in original). The same reasoning applies with equal force to Padilla.

It is a foregone conclusion that Padilla will testify at the evidentiary hearing that he would not have pleaded guilty except for his lawyer's misadvice. Given the clear holding of Fuartado, other controlling law, and the probable outcome of any trial in this case, there surely cannot be much doubt about the result. I would not remand this case for such a proceeding.

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HARDIN CIRCUIT COURT
DIVISION III
INDICTMENT NO. 01-CR-00517

COMMONWEALTH OF KENTUCKY — PLAINTIFF

VS. FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING RCr 11.42 MOTION

JOSE R. PADILLA — DEFENDANT

* * * * *

The Defendant ("Padilla") seeks to set aside the Judgment and Order Imposing Sentence which resulted from his plea of guilty. Padilla pled guilty to the felony offense of Trafficking in Marijuana, Greater Than Five Pounds; Padilla transported approximately 1,000 pounds of marijuana. Padilla was scheduled for a trial by jury on August 2, 2002. Padilla decided to plead guilty on the day of trial. The Court has reviewed the record of Padilla's guilty plea (Tape 02-195, August 2, 2002 at 9:40:42-9:51:15). Padilla was thoroughly questioned, and there is no question that his plea was a knowing, intelligent and voluntary action on his part.

Padilla asserts that his counsel did not properly investigate and advise him of possible deportation consequences. Although Padilla is a Vietnam veteran, he is not a United States citizen. Padilla appears to be a Honduran national according to documents he has filed, which include

an Immigration Detainer filed by the Immigration and Naturalization Service.

Under RCr 11.42, the court is required to give the Commonwealth an opportunity to respond to Padilla's motion. RCr 11.42(4). In this case, the Commonwealth did not respond. Such an answer is not required. See Polsgrove v. Commonwealth, Ky., 439 S.W.2d 776 (1969). The court then examines the motion and the entire record to determine whether Padilla's specific factual allegations are refuted by the record itself. If they are, the motion may be decided without an evidentiary hearing. Padilla is not entitled to appointment of counsel unless the court determines that an evidentiary hearing is required. See RCr 11.42(5); Fraser v. Commonwealth, Ky., 59 S.W.3d 448 (2001).

In support of his motion, Padilla cites Fuartado v. Commonwealth, Case No. 2002-CA-001729-MR, an unpublished decision of the Court of Appeals of Kentucky. Discretionary review of that decision was granted by the Kentucky Supreme Court on June 9, 2004, and the case is still pending. The Fuartado opinion may not be cited or used as authority. CR 76.28(4). Even if it could be cited, it would not authorize the relief Padilla seeks in the circumstances presented. The Court of Appeals in Fuartado held that the trial court committed no error in accepting a guilty plea without the defendant being first advised of possible deportation consequences. The court then held that the complete failure of counsel to consider deportation consequences would justify relief under RC4 11.42. The issue must be decided on a case by case basis.

A valid guilty plea does not require that a defendant be informed of every possible consequence of the plea. For example, a defendant need not be informed of minimum parole eligibility. Turner v. Commonwealth, Ky. App., 647 S.W.2d 500 (1982). See also Centers v. Commonwealth, Ky. App., 799 S.W.2d 51 (1990) (failure to inform defendant that sentence received would be consecutive to other sentences did not amount to ineffective assistance of counsel). No published Kentucky case squarely addresses the issue of deportation consequences, and the courts of other states are divided on the issue. See generally, Annot., Ineffective Assistance of Counsel: Misrepresentation, or Failure to Advise, of Immigration Consequences of Guilty Plea – State Cases, 65 A.L.R.4th 719.

Even if Kentucky's Supreme Court eventually affirms Fuartado and holds that ineffective assistance of counsel could be shown in some circumstances where a defendant is not properly advised about deportation consequences, the circumstances appearing in the record in this case requires that the present motion be denied. This case includes documents pertaining to bond from the Hardin District Court. By an order entered on September 19, 2001, Padilla's bond was changed because he "is believed to be an illegal alien who is awaiting deportation by the Federal authorities." Thus, it appears that from the very beginning of this case Padilla would have been aware of the possibility of deportation. In his own motion, Padilla does not state that his counsel did not discuss this issue with him. Padilla affirmatively states that his attorney commented on the matter and indicated that Padilla "did not have

to worry about immigration status since he had been in the country so long."

Padilla's counsel does not make a deportation decision, and neither does this Court. This record indicates that Padilla was aware of the possibility that he could be deported. Padilla cannot show ineffective assistance of counsel merely because of a statement of opinion on whether the Immigration and Naturalization Service would choose to deport Padilla given his length of time in the Unites States.

Therefore,

IT IS HEREBY ORDERED AND ADJUDGED that the RCr 11.42 motion is denied.

So Ordered this 14th day of September, 2004.

/s/ Kelly Mark Easton
JUDGE, HARDIN CIRCUIT COURT
DIVISION III

ENTERED 9/14/04
ATTEST: RALPH BASKETT,
CLERK
HARDIN CIRCUIT COURT

OPPOSITION BRIEF

117

(2)

No. 08-651

Supreme Court, U.S.
FILED
JAN 21 2009
CLERK

IN THE

Supreme Court of the United States

JOSE PADILLA,

Petitioner

versus

COMMONWEALTH OF KENTUCKY,

Respondent

On Petition for Writ of Certiorari to the Supreme Court Kentucky

---

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Whether a criminal defense attorney has an affirmative duty to investigate and advise a criminal defendant in state court of collateral consequences, such as deportation, that defendant may face as a result of his guilty plea in state court?

II. Assuming there is no affirmative duty to advise a state court defendant of collateral consequences stemming from a guilty plea entered in state court, could misadvice regarding a collateral consequence, such as deportation, constitute ineffective assistance of counsel under the Sixth Amendment?

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OPINION BELOW

Citations to the official and unofficial reports of the opinions below are adequately set forth in the certiorari petition, as well as in the appendix thereto.

JURISDICTION

The petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a). The petition was timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are adequately set forth in the Petition.

COUNTERSTATEMENT OF THE CASE

The facts of this case were best summarized by the Kentucky Supreme Court in Commonwealth v. Padilla, 253 S.W.3d 482 (Ky. 2008) as follows:

> Jose Padilla is a native of Honduras who has lived in this country for decades. He served in the United States military during the Vietnam War. Padilla was indicted by the Hardin County Grand Jury for trafficking in more than five pounds of marijuana, possession of marijuana, possession of drug paraphernalia, and operating a tractor/trailer without a weight and distance tax number. Padilla, represented by counsel, moved to enter a guilty plea to the three drug-related charges, in exchange for dismissal of the remaining charge, and a total sentence of ten years on all charges. The plea agreement provided that Padilla would serve five years of this ten year sentence, and would be sentenced to probation for the remaining five years. Final judgment was entered on October 4, 2002.
>
> On August 18, 2004, Padilla filed an RCr 11.42 motion for post-conviction relief alleging that his attorney was ineffective in misadvising him about the potential for deportation as a

consequence of his guilty plea. Padilla alleged that his counsel told him that he "did not have to worry about immigration status since he had been in the country for so long." The Hardin Circuit Court denied the RCr 11.42 motion on the basis that a valid guilty plea does not require that the defendant be informed of every possible consequence of the guilty plea. It reasoned that since Appellee's [Padilla's] bond was changed because he was suspected of being an illegal alien, he was aware of the possibility of deportation, and the court noted that counsel did discuss the issue with him. The court concluded that: "Padilla's counsel does not make a deportation decision and neither does this Court."

On appeal, the Court of Appeals reversed the decision of the Hardin Circuit Court and remanded the case for an evidentiary hearing. The Court of Appeals had the benefit of this Court's recent decision in *Commonwealth v. Fuartado,* which determined that collateral consequences are outside the scope for representation required by the Sixth Amendment and that failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel. However, the

> majority of the Court of Appeals panel found this case distinguishable from that unequivocal holding in *Fuartado*. The Court of Appeals held that although collateral consequences do not have to be advised, "an affirmative act of 'gross misadvice' relating to collateral matters can justify post-conviction relief." The Court of Appeals concluded that counsel's wrong advice in the trial court regarding deportation could constitute ineffective assistance of counsel.

Id. at 483-484 (footnotes omitted).

On discretionary review the Kentucky Supreme Court reversed the Court of Appeals holding that,

> As collateral consequences are outside the scope of the guarantee of the Sixth Amendment right to counsel, it follows that counsel's failure to advise Appellee of such collateral issue or his act of advising Appellee incorrectly provides no basis for relief. In neither instance is the matter required to be addressed by counsel, and so an attorney's failure in that regard cannot constitute ineffectiveness entitling a criminal defendant to relief under *Strickland v. Washington*.

Commonwealth v. Padilla, 253 S.W.3d 482, 485 (Ky. 2008), (additional citations omitted).

REASONS FOR DENYING THE WRIT

I. The Sixth Amendment Does Not Guarantee a Criminal Defendant to Any Advice from Counsel Concerning Collateral Consequences that Defendant May Face as a Result of a Guilty Plea.

Effective assistance of trial counsel as guaranteed by the Sixth Amendment, ". . .extends to and encompasses only those activities which tend to protect a criminal defendant; right to a fair and intelligent determination of guilt or innocence." Commonwealth v. Fuartado, 170 S.W.3d 384, 386 (Ky. 2005), citing Strickland v. Washington, 466 U.S. 668 , 686 (1984). Further, it is well settled that, "[t]he defendant need only understand the direct consequences of the plea; he need not be made aware every consequence that, absent a plea of guilty, would not otherwise occur." U.S. v. Hernandez, 234 F.3d 252, 255 (5th Cir. 2000), citing Trujillo v. United States, 377 F.2d 266, 266 (5th Cir.), cert. denied, 389 U.S. 899, 88 S.Ct. 224, 19 L.Ed.2d 221 (1967).

Because deportation does not stem directly from the conviction and because the sentencing court has no power over deportation decisions it is clear that a criminal defendant's risk of deportation is collateral to any criminal conviction. Presently, all circuits that have addressed the issue, "...have concluded that deportation is a collateral consequence of the criminal process and hence the failure to advise does not amount to ineffective assistance of counsel." United States v. Fry, 322 F.3d 1198, 1200 (9th Cir. 2003), citing United States v. Banda, 1 F.3d 354, 356 (5th Cir.1993).[1]

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[1] *accord* United States v. Gonzalez, 202 F.3d 20, 25 (1st Cir.2000); Varela v. Kaiser, 976 F.2d 1357, 1358 (10th Cir.1992), cert. denied, 507 U.S. 1039 (1993); United States v. Del Rosario, 902 F.2d 55, 59 (D.C.Cir.1990), cert. denied, 498 U.S. 942 (1990); Santos v. Kolb, 880 F.2d 941, 945 (7th Cir.1989), cert. denied, 493 U.S. 1059 (1990); United States v. Yearwood, 863 F.2d 6, 7-8 (4th Cir.1988); United States v. Campbell, 778 F.2d 764, 769 (11th Cir.1985); United States v. Santelises, 509 F.2d 703, 704 (2d Cir.1975)(per curiam); United States v. Couto, 311 F.3d 179, 187 (2nd Cir. 2002); El-Nobani v. United States, 287 F.3d 417, 421 (6th Cir. 2002); United States v. Romero-Vilca, 850 F.2d 177, 179 (3d Cir.1988).

Petitioner argues that the that because changes in immigration laws have made deportation mandatory for certain criminal offenses deportation should no longer be considered a collateral consequence. However, this argument as also been rejected by the circuits. In Santos-Sanchez v. United State, 548 F.3d 327, 336 -337 (5th Cir.2008), the Fifth Circuit rejected this argument as follows:

> Santos-Sanchez notes that recent changes in immigration laws, particularly the closure of avenues for discretionary relief from deportation in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub.L. No. 104-208, 110 Stat. 3009-546, have rendered deportation a certainty for some defendants that enter guilty pleas. Santos-Sanchez suggests changes in the law have so altered the nature of deportation that it is now in some cases a direct consequence of a guilty plea. Santos-Sanchez thus asserts that, at least in cases where deportation is a near-certain consequence of a guilty plea, counsel must inform defendants of the immigration consequences of their guilty plea to provide effective assistance.

This argument has been working its way through the circuit courts. In the first case to address this issue, the First Circuit held that IIRIRA did not alter the court's prior holding that deportation was a collateral consequence of a guilty plea. *See* United States v. Gonzalez, 202 F.3d 20, 28 (1st Cir.2000). The court first noted that "the immigration consequences of a plea are collateral irrespective of the reason for which an alien is deemed deportable." Id. at 26. It went on to state that

> [w]hat renders the plea's immigration effects collateral is not that they arise virtually by operation of law, but the fact that deportation is not the sentence of the court which accepts the plea but of another agency over which the trial judge has no control and for which he has no responsibility.

Id. at 27 (quotations and alterations omitted). The court reasoned that, regardless of how automatic IIRIRA might have rendered deportation, it was still beyond the control and responsibility of the district court. Id. The First Circuit thus "reject[ed] the argument that [IIRIRA has] so altered the relationship between conviction and

deportation that revisitation of [its] prior holdings on that relationship [was] required." Id. at 28. Consequently, the collateral nature of deportation "bar[red] any ineffective assistance claims based on an attorney's failure to advise a client of his plea's immigration consequences." Id.

The Tenth Circuit came to the same conclusion in Broomes v. Ashcroft, 358 F.3d 1251 (10th Cir.2004). Like the First Circuit, the Tenth Circuit had previously held that " 'deportation is a collateral consequence of the criminal proceeding and therefore the failure to advise does not amount to ineffective assistance of counsel.' " Id. at 1256 (quoting Varela v. Kaiser, 976 F.2d 1357, 1358 (10th Cir.1992)). In Broomes, the court held that neither IIRIRA nor the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214, altered the collateral nature of deportation. Broomes, 358 F.3d at 1256-57. As the court noted, "[a] consequence is collateral if it 'remains beyond the control and responsibility of the district court in which that conviction was entered.' " Id. at 1256 (quoting Gonzalez, 202 F.3d at 27). The Tenth Circuit thus concluded that

> [s]tate courts have no more control over whether a criminal defendant will be deported today than they did prior to the 1996 Acts. Accordingly, deportation remains a collateral consequence of a criminal conviction, and counsel's failure to advise a criminal defendant of its possibility does not result in a Sixth Amendment deprivation.

Id. at 1257.

> We agree with the First and Tenth Circuits that the changes wrought by IIRIRA have not so altered the nature of deportation as to wholly undermine our holding in Banda. We, like our sister circuits, have drawn a bright line between the direct and collateral consequences of a guilty plea and require that counsel advise a defendant of only the former.

Santos-Sanchez, 548 F.3d at 335-336.

Likewise, the 6th Circuit reached the same conclusion in El-Nobani v. United States, 287 F.3d 417 (6th Cir.2002), holding that,

> the automatic nature of the deportation proceeding does not necessarily make deportation a direct consequence of the

guilty plea. A collateral consequence is one that "remains beyond the control and responsibility of the district court in which that conviction was entered." United States v. Gonzalez, 202 F.3d 20, 27 (1st Cir.2000). While this Court has not specifically addressed whether deportation consequences are a direct or collateral consequence of a plea, it is clear that deportation is not within the control and responsibility of the district court, and hence, deportation is collateral to a conviction. United States v. Romero-Vilca, 850 F.2d 177, 179 (3d Cir.1988) ("[W]e hold that potential deportation is a collateral consequence of a guilty plea."); United States v. Quin, 836 F.2d 654, 655 (1st Cir.1987) ("[D]eportation in this context is generally regarded as a collateral consequence."); United States v. Campbell, 778 F.2d 764, 767 (11th Cir.1985) ("[D]eportation is a collateral consequence of a guilty plea."); United States v. Russell, 686 F.2d 35, 39 (D.C.Cir.1982) ("It has become well settled, however, that Rule 11 does not require informing a defendant of the possibility of deportation."). Thus, the fact that petitioner was unaware of the deportation consequences of his pleas does not make his pleas unknowing or involuntary.

Id. at 421.

Because it is settled amongst the circuits that deportation is collateral and that recent changes to immigration laws have not altered that holding, this Court need not grant certiorari.

II. Because Potential Deportation is a Collateral Consequence, an Attorney's failure to advise is indistinguishable from alleged misadvice.

Petitioner essentially acknowledges that a criminal defense attorney has no affirmative duty to inform a criminal defendant of collateral consequences like deportation. However, Padilla argues that once a criminal defense attorney attempts to give advice on a collateral matter that advice must be accurate or the attorney risks being ineffective and thus, depriving his client of the right of counsel under the Sixth Amendment. While petitioner is correct that several circuits have in fact held that "gross misadvice" with regard to a collateral consequence may give rise to an ineffective

assistance of counsel claim,[2] those decision are fatally flawed.

Because consequences, like deportation, are collateral to a criminal conviction drawing an arbitrary distinction between the "failure to advise" and "affirmative misadvice" effectively destroys the legal premise on which consequences are determined to be collateral are based. The right to counsel under the Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel to ensure that he or she receives a fair trial and a just determination of guilt. Strickland v. Washington, 466 U.S. 668 , 684-686 (1984). The reasoning for not requiring criminal defense counsel to advise a criminal defendant of a consequence not directly stemming from a conviction, i.e. collateral consequence, is that the Sixth Amendment encompasses criminal prosecutions only and does not extend to matters not directly stemming from the criminal prosecution. Thus, it is nearly universally

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[2] *See* authority cited by Petitioner in footnote n.12 of his petition.

accepted that a defendant's trial counsel cannot be ineffective for failing to advise his client as to the risk of deportation or other collateral consequences.

In its prior decision in Commonwealth v. Fuartado, 170 S.W.3d 384, 386 (Ky. 2005), the Kentucky Supreme Court, relying on applicable precedent from this Court, logically and accurately reasoned that,

> The constitutional requirement of effective assistance of counsel, therefore, extends to and encompasses only those activities which tend to protect a criminal defendant's right to a fair and intelligent determination of guilt or innocence. *See id.* [Strickland v. Washington, 466 U.S.] at 686, 104 S.Ct. 2052 ("In giving meaning to the requirement [of effective assistance of counsel], ... we must take its purpose-to ensure a fair trial-as the guide."); McMann v. Richardson, 397 U.S. 759, 766, 90 S.Ct. 1441, 1446, 25 L.Ed.2d 763 (1970) (since a guilty plea is also a waiver of trial, it is endowed with certain constitutional protections.)
>
> In cases where defendants are agreeing to plead guilty in accordance with a plea bargain, this principle of protecting a criminal defendant's right to be fairly tried and justly convicted is extended to

include investigating and advising the criminal defendant on all aspects of the plea and the direct consequences thereof-such as the sufficiency of the evidence supporting the plea, the availability of substantial defenses, the loss of several fundamental constitutional rights, and the punishment that may be imposed by the trial court. *See* Brady v. United States, 397 U.S. 742, 755, 90 S.Ct. 1463, 1472, 25 L.Ed.2d 747 (1970) (defendant must be "fully aware of the direct consequences" of a guilty plea) (emphasis added); Beasley v. United States, 491 F.2d 687, 696 (6th Cir.1974) (setting forth standards for effective assistance of counsel). The existence of collateral consequences is irrelevant to the determination of a defendant's guilt or innocence and completely outside the authority or control of the trial court. Accordingly, we find, along with the majority of other courts determining the issue, that the Sixth Amendment requires representation encompassing only the criminal prosecution itself and the direct consequences thereof. Because the consideration of collateral consequences is outside the scope of representation required under the Sixth Amendment, failure of defense counsel to advise Appellee of potential deportation consequences was not

> cognizable as a claim for ineffective assistance of counsel.

Fuartado, 170 S.W.3d at 386.

In the present case the Kentucky Supreme Court merely applied the well-settled logic employed to reach its conclusion in Fuartado finding that,

> As collateral consequences are outside the scope of the guarantee of the Sixth Amendment right to counsel, it follows that counsel's failure to advise Appellee of such collateral issue or his act of advising Appellee incorrectly provides no basis for relief. In neither instance is the matter required to be addressed by counsel, and so an attorney's failure in that regard cannot constitute ineffectiveness entitling a criminal defendant to relief under *Strickland v. Washington*.

Commonwealth v. Padilla,253 s.W.3d 482, 485 (Ky. 2008).

Logically, if the scope of the Sixth Amendment extends only to criminal prosecutions and the consequences stemming therefrom, then a defendant's counsel cannot be constitutionally ineffective for failing to advise or misadvising his

client with regard to consequences that are collateral.

That is not to say that defense attorney's should feel free to misadvise their clients as to those collateral matters in an effort to placate those clients. Ultimately, a criminal defense attorney still retains an ethical obligation separate and apart from the guarantees of the Sixth Amendment to his or her client and may still face adverse repercussions from such behavior from the bar or civil court in an action for malpractice. However, this Court must not extend a criminal Sixth Amendment right to counsel in criminal prosecutions to matters wholly collateral to the criminal prosecution. To do so would essentially erode the reasoning and logic established by this Court and employed by the circuits to determine what consequences are in fact collateral.

CONCLUSION

WHEREFORE, certiorari review should be denied.

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REPLY BRIEF

Supreme Court, U.S.
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No. 08-651

IN THE
Supreme Court of the United States

JOSE PADILLA,
Petitioner,

v.

COMMONWEALTH OF KENTUCKY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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REPLY BRIEF

Respondent's opposition underscores the need for this Court's review. Respondent (like the court below) acknowledges that the federal and state courts are deeply riven by conflict over the proper Sixth Amendment standard to apply to ineffective-assistance claims regarding advice on the deportation consequences of guilty pleas. This Court's review is all the more imperative because the categorical rule Respondent defends – that advice on collateral consequences of a conviction is not within the scope of the Sixth Amendment – directly conflicts with *Hill v. Lockhart*, 474 U.S. 52 (1985), which held that ineffective-assistance claims regarding advice on the collateral consequence of parole eligibility must be analyzed under the two-prong standard of *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under *Strickland*, the objective reasonableness of attorney performance is determined by "[p]revailing norms of practice as reflected in American Bar Association standards and the like," *id.* at 688, and those standards clearly enjoin defense counsel to advise immigrant defendants of the deportation consequences of guilty pleas. Respondent does not deny the importance of this recurring issue, given the massive numbers of immigrants facing mandatory deportation for a broad array of felony convictions under the amended federal immigration laws. Nor does Respondent contest that this is an

ideal vehicle for resolving the conflict. This Court should grant review.

1. As demonstrated by the petition and the *amici curiae* brief of the criminal and immigration law professors and immigrant-rights organizations, the lower courts are deeply divided on the questions presented. Pet. 10-16; Amici Br. 10-15. Indeed, the Kentucky Supreme Court acknowledged that its decision conflicted with "a number of jurisdictions." Pet. App. 23 nn.6 & 7.

On the first question, at least 27 federal courts of appeals and state supreme courts (including Kentucky's) hold that criminal defense counsel have no Sixth Amendment duty to advise immigrant defendants of the deportation consequences of a guilty plea because it is "collateral" to the conviction. Amici Br. 11-12 (listing cases). On the other side of the divide, three state supreme courts and one state appellate court reject the collateral consequences doctrine as a categorical rule of exclusion under the Sixth Amendment in favor of the two-part *Strickland* test, and three of them have held that at least in some circumstances counsel's failure to advise the defendant of collateral immigration consequences violates the Sixth Amendment. *See State v. Paredez*, 101 P.3d 799, 804-05 (N.M. 2004) (finding duty to advise based on ABA standards); *In re Resendiz*, 19 P.3d 1171, 1174 (Cal. 2001) (rejecting collateral

consequences doctrine as inappropriate to Sixth Amendment analysis and holding that misadvice was objectively unreasonable); *People v. Pozo*, 746 P.2d 523, 525-26 (Colo. 1987); *State v. Creary*, No. 82767, 2004 WL 351878, at *2 (Ohio Ct. App. Feb. 26, 2004). Respondent contends that all the *federal* circuits uniformly embrace the collateral consequences rule, Opp. 6, but does not address the split of authority with these state supreme courts.

Respondent does acknowledge the stark split of authority on the second question presented: "While petitioner is correct that several circuits have in fact held that 'gross misadvice' with regard to a collateral consequence may give rise to an ineffective assistance of counsel claim, those decision[s] are fatally flawed." Opp. 12-13. Indeed, there is now an entrenched 17-2 split among the circuits, with Kentucky now joining the D.C. Circuit as the lone courts holding that even affirmative misadvice about the collateral consequence of deportation cannot give rise to an ineffective-assistance claim under the Sixth Amendment. *See United States v. Sambro*, 454 F.2d 918, 926-27 (D.C. Cir. 1971) (affirming refusal to allow withdrawal of a defendant's guilty plea where defendant was misadvised about possible deportation); Pet. 11-14 (also citing jurisdictions allowing ineffective-assistance claims for misadvice about other collateral consequences); Amici Br. 13-15. Thus, Respondent's acknowledgment that a large

and mature split exists, coupled with its contention that the majority rule on this recurring constitutional issue is "fatally flawed," Opp. 12-13, effectively concedes that review is warranted.

2. Resolution of this split is especially necessary because in a number of states the state supreme court's rule conflicts with that of the federal court of appeals with jurisdiction in that state. The Kentucky Supreme Court's decision conflicts with the Sixth Circuit's rule. *See Sparks v. Sowders*, 852 F.2d 882, 885 (6th Cir. 1988) (gross misadvice regarding the collateral consequence of parole eligibility "can amount to ineffective assistance of counsel"). Similar problems occur in Colorado, New Mexico, Ohio, and California.[1]

Not only will the criminal defense bar in those states be subject to conflicting rules, but it is also untenable for state courts and federal courts in habeas proceedings to apply conflicting constitutional rules to the *same* conviction. It undermines the exhaustion policy of federal habeas

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[1] *Compare Pozo*, 746 P.2d at 526-29 *and State v. Paredez*, 101 P.3d 799, 805 (N.M. 2004), *with Broomes v. Ashcroft*, 358 F.3d 1251, 1257 (10th Cir. 2004). *Compare Creary*, 2004 WL 351878, at *2 (Ohio Ct. App. Feb. 26, 2004), *with El-Nobani v. United States*, 287 F.3d 417, 421 (6th Cir. 2002). *Compare Resendiz*, 19 P.3d at 1181, *with United States v. Kwan*, 407 F.3d 1005, 1015-16 (9th Cir. 2005).

law if the federal court applies different federal constitutional rules to overturn a state-court conviction. Moreover, many prisoners with short sentences will not have the opportunity to secure federal habeas relief from an unconstitutional state-court conviction, since AEDPA requires them to be "in custody." 28 U.S.C. § 2254(a); *Maleng v. Cook*, 490 U.S. 488, 492 (1989). They will continue to be convicted felons even if the federal court of appeals in that state would have granted them relief. This Court should not tolerate conflicting federal constitutional rules in the federal court of appeals and state supreme court within the same state.

3. The adoption by a majority of courts (including the court below) of the collateral consequences doctrine as a rule of exclusion from the Sixth Amendment directly contradicts the precedents of this Court. Even as to so-called "collateral consequences" of a plea, this Court has held that ineffective-assistance claims must be determined under the two-part *Strickland* test of whether the attorney's failure was objectively unreasonable by professional standards and prejudicial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985). This Court should grant review to vindicate its precedent.

A court has a due process obligation to ensure that a defendant's guilty plea is voluntary, knowing and intelligent. *Kercheval v. United States*, 274 U.S.

220, 223 (1927). Accordingly, Federal Rule of Criminal Procedure 11, as originally promulgated in 1944, forbade federal courts to "accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge." Fed. R. Crim. P. 11 (1944). Courts interpreted Rule 11 to "mean that the defendant should understand the 'consequences of the plea,'" *Trujillo v. United States*, 377 F.2d 266, 268 (5th Cir. 1967, and indeed Rule 11 was amended in 1966 to add the phrase "'and the consequences of the plea' to state what clearly is the law." Fed. R. Crim. P. 11 advisory committee's note (1966).

Courts, however, rejected the notion that courts could not accept a guilty plea under Rule 11 without advising the defendant "of every 'but for' consequence which follows from a plea of guilty." *Trujillo*, 377 F.2d at 268. The rule emerged that so long as the court advised the defendant of the direct consequences of conviction (such as maximum or mandatory sentences), it "need not instruct an accused on all possible legal disadvantages and collateral consequences of his conviction on the charges in an indictment." *United States v. Washington*, 341 F.2d 277, 286 (3d Cir. 1965); *Durant v. United States*, 410 F.2d 689, 692 (1st Cir. 1969). Thus, Rule 11 did not require that the court at the allocution stage advise the defendant of consequences collateral to the conviction such as loss

of passport, deportation, loss of voting privileges, undesirable discharge from the armed services, or (in some jurisdictions) eligibility for parole. *Trujillo*, 377 F.2d at 268-69; *Durant*, 410 F.2d at 692.

The rationale for excluding "collateral consequences" from Rule 11 turned on concerns that a duty to advise defendants of collateral consequences, which are often subject to manifold factual contingencies or the vagaries of state law, would "impose upon the judge an impractical burden out of all proportion to the essentials of fair and just administration of the criminal laws." *United States v. Cariola*, 323 F.2d 180, 186 (3d Cir. 1963). Indeed, when Rule 11 was subsequently amended to enumerate the consequences the court had to disclose, the Advisory Committee noted that "certain consequences of a plea of guilty, such as parole eligibility, may be so complicated that it is not feasible to expect a judge to clearly advise the defendant" at the allocution stage, and "[s]imilar complications exist with regard to other, particularly collateral consequences, of the plea." Fed. R. Crim. P. 11 advisory committee's note (1974).

This Court embraced the direct/collateral distinction in due process cases of the same vintage. In 1969, this Court held that, because a guilty plea was "itself a conviction," before accepting a plea the court had to make a "reliable determination" of

voluntariness on the record by "canvass[ing] the matter with the accused to make sure he has a full understanding of what the plea connotes and of *its consequence*." *Boykin v. Alabama*, 395 U.S. 238, 242, 243-44 (1969) (emphasis added). In 1970, in holding a plea would not be involuntary because of the coercive effect of the death penalty, this Court clarified that guilty pleas would be deemed voluntary if "entered by one fully aware of the *direct consequences* . . . unless induced by threats . . . misrepresentation . . . or perhaps promises that are, by their nature, improper . . . ." *Brady v. United States*, 397 U.S. 742, 755 (1970) (quoting *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc)).

The Rule 11/*Brady* obligations of a court do not, however, define counsel's duties under the Sixth Amendment. Contemporaneously with *Boykin* and *Brady*, this Court held that a defendant is entitled to "effective assistance of counsel" in pleading guilty to a felony, and therefore "the constitutional standard" was whether the "advice was within the range of competence demanded of attorneys in criminal cases." *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970).

Significantly, in *Hill v. Lockhart*, this Court clarified that the test for effective assistance was *not* the Rule 11/*Brady* test, but rather the context-

specific test of *McMann* and *Strickland*, which required that the advice regarding the guilty plea be objectively unreasonable and prejudicial. 474 U.S. at 58-59. Hill claimed that his plea was involuntary because his counsel supplied him with incorrect information about parole eligibility, widely recognized as a collateral consequence. *Id.* at 54-55; *see Trujillo*, 377 F.2d at 269. This Court observed that "[w]e have never held that the United States Constitution requires *the State* to furnish a defendant with information about parole eligibility in order for the defendant's plea of guilty to be voluntary, and indeed such a constitutional requirement would be inconsistent with the current rules of procedure governing the entry of guilty pleas in the federal courts." *Hill*, 474 U.S. at 56 (citing Fed. R. Crim. P. 11(c); Fed. R. Crim. P. 11 advisory committee's note (1974) (explaining the exclusion of parole eligibility as a collateral consequence)) (emphasis added). However, this did not answer the ineffective-assistance question. The Court held that "the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel," requiring a showing of objectively unreasonable performance under *McMann* and a prejudicial effect on the outcome of the plea process. *Id.* at 58-59.

Notwithstanding *Hill*'s express holding that courts must apply the two-part *Strickland* test to an

ineffective-assistance claim regarding attorney advice on the collateral consequence of parole eligibility, courts in a large number of jurisdictions have mechanically imported the Rule 11 collateral consequences doctrine into Sixth Amendment doctrine.

The direct conflict of large numbers of courts with *Hill* alone justifies this Court's review, but (as scholars have pointed out) "[t]he collateral consequences rule does not capture, even as a rule of thumb, . . . the concerns of competent lawyers or their clients, . . . and should be irrelevant to *Strickland* analysis." Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697, 712 (2001-2002).

A Rule 11 doctrine reflecting the limited role and capacity of a court at the allocution stage is not suited to determining standards of attorney competence. "The judge is charged with ensuring that the plea is knowing, voluntary, and intelligent; counsel's job is to assist with the determination that a plea is a good idea, which encompasses a broader range of considerations." *Id.* at 727. Defense counsel has distinct, far-ranging duties under the Sixth Amendment (among other things) to investigate facts relevant to liability and sentencing, *Rompilla v. Beard*, 545 U.S. 374, 377 (2005); *Wiggins v. Smith*,

539 U.S. 510, 521-22 (2003), "to consult with the defendant on important decisions," *Strickland*, 466 U.S. at 688, to "discuss potential strategies with the defendant," *Florida v. Nixon*, 543 U.S. 175, 178 (2004), to make predictive judgments about the strength of the State's case and how it would be received by court or jury, *McMann*, 397 U.S. at 771, and to provide reasonably competent advice on whether to plead guilty, *id.* at 770; *see Resendiz*, 19 P.3d at 1181. Indeed, the allocution court's duties are limited under *Brady* precisely because the court may generally presume that defense counsel has competently advised the defendant regarding the plea. *Brady*, 397 U.S. at 748 n.6; *Libretti v. United States*, 516 U.S. 29, 50-51 (1995) (counsel, not the trial court, bears "the responsibility . . . to inform the defendant of the advantages and disadvantages of a plea agreement"); Chin & Holmes, *supra*, at 728-32.

Because the attorney's duties are so context-specific and multifaceted, "specific guidelines" like the collateral consequences rule "are inappropriate," and "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms . . . as reflected in the American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice," *Strickland*, 466 U.S. at 688.[2] Thus, the question should not be whether

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[2] *See Williams v. Taylor*, 529 U.S. 362, 396 (2000) (relying on the ABA Standards for Criminal Justice); *Roe v. Flores-Ortega*,

deportation advice is categorically excluded from the Sixth Amendment because it concerns collateral consequences, or whether there is another categorical exception for affirmative misadvice. Rather, the question under the first *Strickland* prong should be, in the context of a given representation, whether it was objectively unreasonable under professional norms for counsel to fail to determine whether the felony to which his immigrant client will plead will result in his mandatory deportation, and further to give wrong advice on this material point without researching the law.

Professional standards leave no doubt that competent counsel must take into account collateral consequences, and in particular deportation, in advising clients regarding felony pleas. ABA standards explicitly require defense counsel to "determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea." ABA Standards for Criminal Justice 14-3.2(f). The commentary to that Standard emphasizes:

> [I]t may well be that many clients' greatest potential difficulty and greatest

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528 U.S. 470, 479 (2000) (same); *Wiggins*, 539 U.S. at 522 (same); *Rompilla*, 545 U.S. at 387 (same).

> priority, will be the immigration consequences of conviction. To reflect this reality, counsel should be familiar with the basic immigration consequences that flow from different types of guilty pleas, and should keep this in mind in investigating law and fact advising the client.

Id. cmt.; *see* Amici Br. 16-17 (citing other standards and sources). Indeed, outside the Sixth Amendment context, this Court has recognized that "alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions," and, if not, "competent defense counsel, following the advice of numerous practice guides," would so advise them. *INS v. St. Cyr*, 533 U.S. 289, 323 n.50 (2001).

Unlike the rigid collateral consequences doctrine, the *Strickland* test allows for the duties of counsel to evolve as the law evolves, such as the recent sea change in immigration law expanding the felonies that result in mandatory deportation. Pet. 8-10; Amici Br. 6-9. And *Strickland* allows for recognition that not all collateral consequences are the same. Deportation is "a savage penalty," *Jordan v. De George*, 341 U.S. 223, 243 (1951) (Jackson, J., dissenting), "the equivalent of banishment," *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948), often

resulting in the "loss of both property or life, or of all that makes life worth living," *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). Because mandatory deportation may be the most material conviction consequence to the defendant, it cannot be categorically excluded from counsel's Sixth Amendment duty of assistance.

4. This Court's review is imperative. The deep and entrenched conflicts among the lower courts require resolution. The prevailing collateral consequences doctrine (adopted and extended by the Kentucky Supreme Court) directly conflicts with this Court's decisions in *Strickland* and *Hill*. The issue is one of surpassing importance because of the sheer numbers of persons affected by the expanded mandatory-deportation provisions of federal immigration statutes; the immigrants deported every year for felony convictions resulting from guilty pleas (many of whom, like Petitioner, have lived most of their lives in the U.S., and have families with deep roots in this country) number in the high tens of thousands. Pet. 10; Amici Br. 15-16; Chin & Holmes, *supra*, at 697. Moreover, this is an ideal vehicle in which all relevant legal issues are clearly presented, a point respondent does not contest. Amici Br. 19-21.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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JOSE PADILLA,

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v.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Kentucky

BRIEF OF *AMICI CURIAE* CRIMINAL AND IMMIGRATION LAW PROFESSORS, CAPITAL AREA IMMIGRANTS' RIGHTS COALITION, WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS, AND WESTERN KENTUCKY REFUGEE MUTUAL ASSISTANCE SOCIETY, INC. IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does the Sixth Amendment's guarantee of effective assistance of counsel require a criminal defense attorney to advise a client who is not a citizen that pleading guilty to an aggravated felony will trigger mandatory, automatic deportation?

2. If a criminal defense attorney misadvises his noncitizen client that a guilty plea will not lead to deportation, and that misadvice induces a guilty plea, can that misadvice amount to ineffective assistance of counsel and warrant setting aside the guilty plea?

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INTERESTS OF *AMICI CURIAE*[1]

Amicus curiae Capital Area Immigrants' Rights (CAIR) Coalition is a nonprofit, legal-services organization founded in 1999. CAIR Coalition provides individuals and organizations representing immigrants with education and training services, leadership on public policy development, forums for sharing information, legal-support services, and other empowerment programs. In addition, CAIR Coalition is the only organization working with individuals detained by the Department of Homeland Security (DHS) in Virginia and the Washington metropolitan area. CAIR Coalition provides legal-rights presentations, conducts pro se workshops, and provides legal advice and assistance to individuals detained by DHS at jails in Virginia and Maryland. CAIR Coalition also secures pro bono legal counsel for immigration detainees. Many of the detained immigrants CAIR Coalition serves have been placed in removal proceedings on account of their criminal convictions. Of those immigrants with criminal convictions, CAIR Coalition regularly encounters a high number who have unwittingly entered into criminal plea

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[1] The parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk of the Court. Counsel of record for all parties received notice at least 10 days before the due date of *amici curiae*'s intention to file this brief. No person other than *amici curiae*, their employer (the University of Pennsylvania Law School), their members, or their counsel made a monetary contribution to its preparation or submission.

agreements which strip them of eligibility for relief in immigration court.

Amicus curiae the Washington Lawyers' Committee for Civil Rights and Urban Affairs, a nonprofit, public-interest organization, seeks to eradicate discrimination and both fully enforce the nation's civil rights laws and protect individuals' constitutional rights by providing legal assistance without regard to immigration status. The Committee was formed in 1968 in response to both a national report issued by the National Advisory Commission on Civil Disorders identifying discrimination and poverty as the root causes of the recent social unrest, and a related call by Senator Robert Kennedy for members of the private bar to mobilize to meet the legal needs of underserved populations. In the Committee's forty-year history, its attorneys have represented thousands of persons who have alleged discrimination on the basis of race, gender, religion, national origin, color, disability, and age, in cases brought under both federal and local civil-rights laws.

The Committee's Immigrant and Refugee Rights Project has, for thirty years, provided legal representation for immigrants, both documented and undocumented, before courts, agencies, and legislative bodies in matters involving constitutional and civil-rights violations. The cases include political asylum claims, claims of diplomatic employees subject to abusive treatment, adjustment of immigrant or nonimmigrant status, and exclusion and deportation cases. The Project also represents many immigrants

in collective and class-action cases involving employment and housing discrimination. More recently, the Immigrant and Refugee Rights Project represents and advocates on behalf of hundreds of immigrants who are victims of racial profiling by local police in the District of Columbia, Virginia, and Maryland. Hundreds of these immigrants, many of whom are legal permanent residents, are vulnerable to deportation if they are charged and found guilty of particular crimes. For this reason, the Immigrant and Refugee Rights Project of the Washington Lawyers' Committee for Civil Rights and Urban Affairs is signing on to this brief and thus hopes to assist the Court in resolving the questions presented in this case.

Amicus curiae Western Kentucky Refugee Mutual Assistance Society, Inc. (WKRMA) is a nonprofit corporation in good standing with the Secretary of State of Kentucky, chartered in 1981. It employs about twelve full-time and four part-time employees. It has resettled about 3,500 refugees and provided services to a similar number of other immigrants. It receives funding from the federal Office of Refugee Resettlement, and, more recently, Interest on Lawyers' Trust Accounts funding from the Kentucky Bar Foundation for its work providing legal education and legal assistance to Kentucky's growing Hispanic population. Such assistance usually involves filing applications for naturalization, visas, employment authorization, and lawful residence under the humanitarian or family unification provisions of the immigration laws. WKRMA has been accredited by the Board of Immigration

Appeals, U.S. Department of Justice, under 8 C.F.R. § 292.1, to prepare and file immigration applications with relevant agencies such as the U.S. Citizenship and Immigration Services (formerly INS).

Amici curiae Criminal and Immigration Law Professors are forty-six law professors who teach, research, and write about criminal or immigration law, including the intersection of the two. The names, titles, and institutional affiliations (for identification purposes only) of these *amici* are listed in Appendix A. Some *amici* work as clinical professors, counseling, advising, and educating noncitizens on the immigration consequences of criminal convictions, and also train attorneys on how to advise clients of these consequences. *Amici* have a professional interest in illuminating this Court's consideration of the doctrinal, historical, and policy issues involved in this Court's interpretation of the Sixth Amendment's guarantee of effective assistance of counsel.

BACKGROUND

This petition presents significant constitutional questions that have deeply divided state and federal courts for decades. Over the last two decades, major federal legislation has radically altered the immigration consequences of criminal convictions, making a broad array of state and federal felonies the basis for mandatory deportation. There are mature conflicts in the lower courts on whether the Sixth Amendment

duty to render effective assistance of counsel requires defense lawyers to advise clients that a conviction will lead to mandatory deportation. There are also mature conflicts on whether a defense lawyer's misadvice about deportation can support an ineffective assistance claim. The Kentucky Supreme Court has answered both questions in the negative, exacerbating the conflicts. Mandatory deportation is a severe consequence for immigrants, many of whom, like petitioner, are lawful long-term residents with deep roots and families in this country. Given these grave consequences, this Court's review is imperative to resolve the conflicts and bring clarity and uniformity to these pressing questions.

Courts have traditionally treated immigration consequences as entirely separate from criminal convictions. Courts treated deportation as a civil remedy rather than criminal punishment, in part because deportation was contingent on further administrative action, the number of crimes that violated immigration law was limited, and judicial discretion and other relief was readily available. Thus, criminal judges need not advise defendants who plead guilty that they may later be deported as a result. *E.g.*, *People v. Ford*, 657 N.E.2d 265 (N.Y. 1995). In other words, deportation is a collateral rather than a direct consequence of a criminal conviction, and judges need mention only direct consequences in plea colloquies. Over the last two decades, however, immigration reforms have increasingly

made deportation an automatic rather than contingent consequence of various criminal convictions.

Before 1990, immigration-enforcement officials had broad discretion whether to deport or admit noncitizens convicted of crimes. *INS v. St. Cyr*, 533 U.S. 293, 294-96 (2001). Courts and others could also use various mechanisms to prevent or halt deportation of a convicted noncitizen. For example, a sentencing judge had discretion to make a judicial recommendation against deportation (JRAD), which prevented deportation for that crime. Immigration and Nationality Act, 8 U.S.C. § 1251(b) (1988), *repealed by* Immigration Act of 1990, Pub. L. No. 101-649, § 505, 104 Stat. 4978, 5050. Beginning in 1990, however, the entire landscape changed.

The Immigration Act of 1990 adopted many provisions to expedite and ensure removal of noncitizens convicted of crimes. For instance, it abolished JRADs and executive pardons. *Id.* The Act also broadened the definition of aggravated felonies and limited the forms of legal relief available to them. It also barred aggravated felons from proving good moral character. They thus became ineligible for asylum, withholding or suspension of deportation, voluntary departure, registry, and naturalization. *Id.* §§ 509, 515(a) (codified as amended at 8 U.S.C. §§ 1101(a)(43), (f)(8), 1158, 1229b-c, 1259(c), 1427(d)).

The Immigration and Naturalization Technical Corrections Act of 1994 (INTCA) further broadened the category of aggravated felons and gave federal

criminal courts the power to order deportation at sentencing, thus bypassing immigration courts. Pub. L. No. 103-416, §§ 222, 224, 108 Stat. 4305, 4322 (codified as amended at 8 U.S.C. §§ 1101(a)(43), 1252(a)).

Two years later, the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA) severely restricted judicial review of administrative removal orders and greatly limited discretionary relief from deportation. For example, AEDPA amended and then IIRIRA repealed former § 212(c) of the Immigration and Naturalization Act, 8 U.S.C. § 1182(c), so that noncitizens convicted of aggravated felonies would no longer be eligible for discretionary relief from deportation. AEDPA, Pub. L. No. 104-132, § 440(d), 110 Stat. 1214, 1276-77 (codified as amended at 8 U.S.C. § 1105a(a)(10)); IIRIRA, Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-546, 3009-597 (1996). IIRIRA reiterated the ban on voluntary departure and cancellation of removal for aggravated felons. § 304(a)(3), 110 Stat. 3009-594, 3009-596 (codified as amended at 8 U.S.C. §§ 1229b-c). IIRIRA and AEDPA further changed the definition of aggravated felonies not only by adding new crimes but also by significantly lowering the thresholds for which offenses qualify as aggravated felonies. For example, thefts, burglaries, and gambling offenses punishable by one year's imprisonment became aggravated felonies. These amended definitions of aggravated felonies applied retroactively, making noncitizens deportable for crimes that at the time were not

aggravated felonies. AEDPA § 440(d), (e)(1) (codified as amended at 8 U.S.C. § 1101(a)(43)(J)); IIRIRA, § 321(a)(3)-(4), (b), (c) (codified as amended at 8 U.S.C. § 1101(a)(43)(F) & (G)). Aggravated felons sentenced to an aggregate of five years' imprisonment or more also became ineligible for withholding of removal. IIRIRA § 305(a) (codified as amended at 8 U.S.C. § 1231(b)(3)(B)).

Because these reforms have eliminated virtually all discretion, lawful permanent residents who are convicted of aggravated felonies and sentenced to at least five years' imprisonment now have no possible relief from deportation. The only exceptions are for extraordinary cases in which noncitizens can show that if deported they would suffer torture, or for those previously determined to be refugees or asylees because of a well-founded fear of persecution. Convention Against Torture, 8 C.F.R. § 1208.16-.17 (2009) (granting those facing torture a right to remain and work, but allowing their status to be revoked at any time and forbidding adjustment of status and the right to bring family members); 8 U.S.C. § 1159(b)-(c) (2000).

As can be seen, these statutes have targeted and enlarged a category of crimes known as aggravated felonies. Today, a wide range of crimes are aggravated felonies and thus trigger automatic deportation. Many of these are nonviolent crimes, including theft, receipt of stolen property, perjury, and tax evasion or fraud of more than $10,000. 8 U.S.C. § 1101(43)(G), (M)(i), (ii), (S). Petitioner's conviction for trafficking

in marijuana is an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). His plea agreement specified five years' imprisonment followed by five years' probation, so he was ineligible for any discretionary relief as he faced no danger of torture.

SUMMARY OF ARGUMENT

Every day in America, noncitizen criminal defendants rely on their lawyers' advice in deciding whether to plead guilty. Many convictions trigger automatic deportation, with no hope of discretionary relief. For decades, however, state and federal courts have been deeply divided over what the Sixth Amendment's guarantee of effective assistance requires in these cases. Courts are split 27-3 on whether nonadvice about immigration consequences violates the Sixth Amendment; two additional states join the minority position under their state constitutions. Courts are also split 17-2 on whether misadvice violates the Sixth Amendment. The issues continue to recur despite decades of percolation and repeated efforts to train defense lawyers. These issues matter greatly to thousands of defendants, many of them lawful permanent residents who will lose their families and livelihoods by pleading guilty to crimes that need not be violent. Thus, in dicta, this Court has suggested that competent attorneys should advise clients of immigration consequences. *INS v. St. Cyr*, 533 U.S. 289, 322-23 & nn.48, 50 (2001). Much of the case law denying a duty to advise rests

on outdated assumptions, importing the collateral-consequence doctrine that governs judges to regulate defense lawyers as well. Deportation is no longer a collateral consequence of conviction, as statutory changes over the last two decades have made it automatic upon conviction of certain crimes, with no discretionary relief. Even if judges need not advise defendants about immigration consequences, defense attorneys serve a different role as counselors and should provide correct advice. Finally, this vehicle is an excellent one: it is a direct appeal from a final judgment, involves no procedural bars, and squarely presents both legal issues on undisputed facts.

ARGUMENT

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE LARGE CIRCUIT SPLITS ON WHETHER COUNSEL'S NONADVICE OR MISADVICE ABOUT DEPORTATION VIOLATES THE SIXTH AMENDMENT

A. There Is a 27-3 Split on Whether the Sixth Amendment Obligates Defense Counsel to Advise Clients Who Are Noncitizens That a Criminal Conviction May Lead to Deportation

Federal and state courts are deeply divided, 27-3, on whether defense counsel has a federal constitutional duty to advise a client who is not a citizen of possible immigration consequences of

criminal convictions. Ten federal circuits and seventeen states hold that defense lawyers are under no obligation. Judges presiding over plea colloquies, they note, need advise defendants only of the direct and not the collateral consequences of convictions. So, the courts reason, defense lawyers should likewise bear no obligation to advise of collateral consequences such as deportation. *United States v. Del Rosario*, 902 F.2d 55, 59 (D.C. Cir. 1990); *United States v. Gonzalez*, 202 F.3d 20, 25 (1st Cir. 2000); *Yong Wong Park v. United States*, 222 F. App'x 82 (2d Cir. 2007); *United States v. Yearwood*, 863 F.2d 6 (4th Cir. 1988); *Santos-Sanchez v. United States*, 548 F.3d 327, 334 (5th Cir. 2008); *Santos v. Kolb*, 880 F.2d 941, 944-45 (7th Cir. 1989), *superseded by statute* Pub. L. No. 101-649, tit. V, § 505(b), 104 Stat. 5050, *cert. denied*, 493 U.S. 1059 (1990); *Gumangan v. United States*, 254 F.3d 701, 706 (8th Cir. 2001); *United States v. Fry*, 322 F.3d 1198 (9th Cir. 2003); *Broomes v. Ashcroft*, 358 F.3d 1251, 1257 (10th Cir. 2004), *cert. denied*, 543 U.S. 1034 (2004); *United States v. Campbell*, 778 F.2d 764 (11th Cir. 1985); *Oyekoya v. State*, 558 So.2d 990 (Ala. Crim. App. 1989); *Tafoya v. State*, 500 P.2d 247, 251 (Alaska 1972), *cert. denied*, 410 U.S. 935 (1973); *State v. Rosas*, 904 P.2d 1245 (Ariz. Ct. App. 1995); *Major v. State*, 814 So.2d 424 (Fla. 2002); *Williams v. Duffy*, 513 S.E.2d 212 (Ga. 1999); *People v. Huante*, 571 N.E.2d 736, 741 (Ill. 1991); *Mott v. State*, 407 N.W.2d 581, 583 (Iowa 1987); *State v. Muriithi*, 46 P.3d 1145, 1152 (Kan. 2002); *Commonwealth v. Fuartado*, 170 S.W.3d 384 (Ky. 2005); *State v. Montalban*, 810 So. 2d 1106 (La. 2002); *Alanis v. State*, 583 N.W.2d 573, 579

(Minn. 1998); *State v. Zarate*, 651 N.W.2d 215 (Neb. 2002); *Barajas v. State*, 991 P.2d 474 (Nev. 1999); *State v. Dalman*, 520 N.W.2d 860 (N.D. 1994); *Commonwealth v. Frometa*, 555 A.2d 92 (Pa. 1989); *Nikolaev v. Weber*, 705 N.W.2d 72 (S.D. 2005); *State v. McFadden*, 884 P.2d 1303 (Utah Ct. App. 1994).

Three courts, however, have recognized that, to render effective assistance of counsel, criminal defense lawyers must advise at least some noncitizen clients of the immigration consequences of a conviction. *People v. Pozo*, 746 P.2d 523, 527 (Colo. 1987) (holding that if lawyer had enough information to believe the client was a noncitizen, effective assistance would require advising about collateral immigration consequences), *rev'd on other grounds*, 746 P.2d 523 (1987) (en banc); *State v. Paredez*, 101 P.3d 799, 805 (N.M. 2004) (holding that an attorney must determine the defendant's immigration status and specifically advise the defendant of the immigration consequences of pleading guilty); *see also State v. Creary*, No. 82767, 2004 WL 351878, at *2 (Ohio Ct. App. Feb. 26, 2004) (explaining that while defense lawyers ordinarily need not advise clients of collateral consequences including deportation, "an evolving sense of the lawyer's duty indicates that such information should be given when it appears critical to the defendant's situation"; lawyer's failure to advise client whom he knew to be interested in deportation consequences can be ineffective). Two other courts have reached this same holding under their own

states' constitutions, reflecting evolving understandings of justice. *Williams v. State*, 641 N.E.2d 44, 49 (Ind. App. 1994) (contending that the collateral label is irrelevant given the seriousness of deportation, and holding that defense attorneys must advise noncitizen defendants of deportation consequences of their guilty pleas); *Lyons v. Pearce*, 694 P.2d 969, 977 (Or. 1985) (appearing to rely on the Sixth Amendment to the United States Constitution); *Gonzalez v. State*, 134 P.3d 955, 958-59 (Or. 2006) (reinterpreting *Lyons* as resting on Oregon's state constitution). And Judge Calabresi, writing for the Second Circuit, has suggested in dicta that nonadvice should amount to ineffective assistance of counsel. *United States v. Couto*, 311 F.3d 179, 187-88 (2d Cir. 2002), *cert. denied*, 544 U.S. 1034 (2005).

B. There Is a 17-2 Split on Whether Defense Attorneys' Misadvice to Noncitizen Clients About Immigration Consequences Violates the Sixth Amendment

There is likewise a large split of authority on whether an attorney's misadvice about immigration consequences is or may be ineffective assistance. Seventeen jurisdictions hold that misadvice is (or may be) ineffective assistance of counsel. *Couto*, 311 F.3d at 187-88; *Strader v. Garrison*, 611 F.2d 61 (4th Cir. 1979); *United States v. Kwan*, 407 F.3d 1005, 1016-18 (9th Cir. 2005); *Downs-Morgan v. United States*, 765 F.2d 1534, 1541 (11th Cir. 1985); *Djioev v. State*, No. A-9158, 2006 WL 361540 (Alaska Ct. App.

Feb. 15, 2006) (unpub); *Alguno v. State*, 892 So. 2d 1200 (Fla. Dist. Ct. App. 2005); *Rollins v. State*, 591 S.E.2d 796, 799 (Ga. 2004); *People v. Correa*, 485 N.E.2d 307 (Ill. 1985); *Rubio v. State*, 194 P.3d 1224, 1230-31 (Nev. 2008); *State v. Garcia*, 727 A.2d 97 (N.J. Super. Ct. App. Div. 1999); *Creary*, 2004 WL 351878, at *3; *King v. State*, No. M2006-02745-CCA-R3-CD, 2007 WL 3052854 (Tenn. Crim. App. Sept. 4, 2007); *State v. Rojas-Martinez*, 125 P.3d 930 (Utah 2005); *Commonwealth v. Tahmas*, Nos. 105254 & 105255, 2005 WL 2249587 (Va. Cir. Ct. July 26, 2005); *Valle v. State*, 132 P.3d 181, 184 (Wyo. 2006); *see also In re Resendiz*, 19 P.3d 1171, 1177 (Cal. 2001) (failure to advise or misadvice may be ineffective); *People v. McDonald*, 745 N.Y.S.2d 276 (N.Y. Ct. App. 2002) (same), *aff'd*, 802 N.E.2d 13 (N.Y. 2003).

On the other side, two jurisdictions reject ineffectiveness claims based on lawyers' misadvice about immigration consequences. The District of Columbia Circuit upheld the refusal to allow withdrawal of a defendant's guilty plea notwithstanding blatant misadvice about the possibility of deportation. *United States v. Sambro*, 454 F.2d 918 (D.C. Cir. 1971). The decision below in this case joined *Sambro* in that minority position: The Kentucky Court of Appeals found that on the facts, petitioner Padilla had received clear misadvice, but for which he would not have pleaded guilty. Pet. App. 36. Nevertheless, the Kentucky Supreme Court squarely held that because counsel had no obligation to advise his client of collateral consequences such as deportation, even

misadvice cannot as a matter of law invalidate a guilty plea. *Commonwealth v. Padilla*, 253 S.W.3d 482 (Ky. 2008); Pet. App. 23.

II. THE ISSUE IS AN IMPORTANT AND RECURRING ONE WORTHY OF THIS COURT'S ATTENTION

The issue of defense-lawyer misadvice or nonadvice about immigration consequences is important and recurring. The dozens of cases cited in the previous section attest to the issue's importance, recurrence, and divergence of approaches. Since AEDPA and IIRIRA were enacted in 1996, an estimated 1.6 million families have been separated and more than 670,000 noncitizens have been deported because of their criminal convictions. *Deportees in Latin America and the Caribbean: Hearing Before the Subcomm. on the Western Hemisphere of the H. Comm. on Foreign Affairs*, 110th Cong. 1 (2007) (statement of Rep. Eliot L. Engel, Chairman, Subcomm. on the Western Hemisphere); MICHAEL E. FIX & WENDY ZIMMERMAN, URBAN INST., ALL UNDER ONE ROOF: MIXED STATUS FAMILIES IN AN ERA OF REFORM (1999). In 2007 alone, the Department of Homeland Security removed 99,900 criminal noncitizens from the United States. A majority of these noncitizens were removed because they had been convicted of drug or immigration crimes. Office of Immigration Statistics Policy Directorate, U.S. Dep't of Homeland Security, *Immigration Enforcement Actions: 2007 Annual Report* 4 tbl.4 (2008). Before AEDPA in 1996, more than half the

applications under § 212(c) received relief from deportation. *St. Cyr*, 533 U.S. at 296 n.5. AEDPA and IIRIRA have choked off that source of discretion by repealing § 212(c) and forbidding discretionary relief for noncitizens convicted of aggravated felonies.

Bar associations recognize the importance of the issue. The ABA has added provisions to the ABA Standards for Criminal Justice stressing the need for attorneys to advise clients of the immigration consequences of a guilty plea. American Bar Ass'n, *ABA Standards for Criminal Justice, Pleas of Guilty*, 1999 ABA Crim. Just. Section 14-3.2(f), cmt. 75 (3d ed. 1999); American Bar Ass'n, *ABA Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons* standard 19.2-3(a). Bar magazines and periodicals repeatedly instruct defense attorneys to warn noncitizen clients that criminal convictions may lead to deportation. *E.g.*, Tova Indritz, *Puzzling Consequences of Criminal Immigration Cases* (pts. 1-3), CHAMPION, Jan./Feb. 2002, at 12, 20, 26; William R. Maynard, *Deportation: An Immigration Law Primer for the Criminal Defense Lawyer*, CHAMPION, June 1999, at 12; Ronald Kaplovitz, *Criminal Immigration: The Consequences of Criminal Convictions on Non-U.S. Citizens*, MICH. BAR J., Feb. 2003, at 30; David C. Koelsch, *Proceed with Caution: Immigration Consequences of Criminal Convictions*, MICH. BAR J., Nov. 2008, at 44; Fernando A. Nuñez, *Collateral Consequences of Criminal Convictions to Noncitizens*, MD. BAR J., July/Aug. 2008, at 40; Rex B. Wingerter, *Consequences of Criminal*

Convictions, MD. BAR J., Mar./Apr. 2004, at 21. A solid minority of states (23 plus the District of Columbia) by statute or rule require judges to warn noncitizens of the immigration consequences of guilty pleas. ARIZ. R. CRIM. P. 17.2(f); CAL. PEN. CODE § 1016.5 (West 2008); CONN. GEN. STAT. § 54-1j (2001); D.C. CODE § 16-713 (2001); FLA. R. CRIM. P. 3.172 (2008); GA. CODE. ANN. § 17-7-93 (1997); HAW. REV. STAT. § 802E-2 (1993); IDAHO R. CRIM. P. 11(d)(1) (2007); 725 ILL. COMP. STAT. 5/113-8 (2004); MD. R. CRIM. P. 4-24(e); ME. R. CRIM. P. 11(b)(5), (h); MASS. ANN. LAWS ch. 278, § 29D (2004); MINN. R. 15.01 (2008); MONT. CODE ANN. § 46-12-210 (1997); NEB. REV. STAT. ANN. § 29-1819.02 (2002); N.M. R. CRIM. P. 5-303(F)(5); N.Y. CRIM. P. § 220.50(7) (2004, to be repealed 2009); N.C. GEN. STAT. § 15A-1022 (1999); OHIO REV. CODE ANN. § 2943.031 (2003); OR. REV. STAT. § 135.385 (1997); R.I. GEN. LAWS § 12-12-22 (2000); TEX. CODE CRIM. PROC. ANN. art. 26.13 (2003); WASH. REV. CODE § 10.40.200 (1990); WIS. STAT. § 971.08 (1993-94); *see also* U.S. DIST. CT. FOR THE DIST. OF COLO. LOCAL RULES § 3, App. K (form guilty plea notification requiring acknowledgement of possible deportation). The repetition of this guidance confirms not only that the issue is important, but also that it continues to recur despite statutes, rules, and persistent efforts to educate attorneys.

This common, recurring issue merits this Court's attention. Immigration law has changed drastically enough in the last two decades that deportation is no longer a contingent, unpredictable, collateral consequence of a conviction for an aggravated felony.

Judges should not have to speculate about future contingencies at guilty-plea allocutions, but deportation is no longer speculative. Statutory changes have broken down the walls between criminal and immigration proceedings, even empowering judges to order deportation at criminal sentencing and eliminating judicial and executive relief after sentencing. The Immigration Act, AEDPA, and IIRIRA have eliminated all discretion not to deport, unless the defendant can prove that if deported he will suffer torture or persecution. If those rare exceptions do not apply, a defendant convicted of an aggravated felony punished by five years' imprisonment (such as petitioner) must be deported automatically. There is no longer an immigration court or other noncriminal body on which the legal effect of an aggravated-felony conviction depends. Deportation is thus a direct rather than a collateral consequence of an aggravated-felony conviction.

Even if judges need not advise defendants of deportation at guilty-plea colloquies, defense lawyers should have to do so. Lower courts have unthinkingly imported the collateral-consequence doctrine from judges' obligations to the very different context of defense lawyers' responsibilities. But defense lawyers, unlike judges, serve as advocates and counselors. At the time of a guilty plea, a judge may know almost nothing about a case, but a defense lawyer should be intimately familiar with it. To guide their clients' decisions to plead guilty or go to trial, lawyers must apprise them of the relevant pros and cons of a

plea, including the legal principles that significantly bear on the client's decision. *Pozo*, 746 P.2d at 529. As counselors, their clients need accurate advice about whether they will be forced to leave the country. *Cf. Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (recognizing defendant's Sixth Amendment right to effective assistance and advice that has a reasonable probability of influencing his decision to plead guilty). It should not matter whether one labels these consequences direct or collateral, civil or criminal. Clients who have lived in this country for many years may care far more about possible deportation than months or years in prison. *Paredez*, 101 P.3d at 805; *Williams v. State*, 641 N.E.2d at 49; *cf. Jordan v. De George*, 341 U.S. 223, 243 (1951) (Jackson, J., dissenting) (describing deportation as "a life sentence of exile. . . . a savage penalty"). Thus, as this Court suggested in dicta, competent defense counsel should follow bar standards and practice guides and warn clients of immigration consequences. *INS v. St. Cyr*, 533 U.S. 289, 322-23 & nn.48, 50 (2001).

III. THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING THE CIRCUIT SPLITS

This case is an excellent vehicle for resolving the circuit splits over defense attorneys' nonadvice and misadvice. It is on direct review from the final judgment of the highest court of a state, with no procedural defaults to obstruct the issue. The issue is presented squarely on undisputed facts: Petitioner has no refugee or asylee status nor prospect of

torture, and his plea to an aggravated felony and acceptance of a five-year prison sentence barred any possible discretionary relief from deportation. The Kentucky Court of Appeals explicitly found that petitioner had been misadvised about deportation and that, had he received proper advice, he would not have pleaded guilty. Pet. App. 36. The Kentucky Supreme Court took no issue with these factual findings. It denied as a matter of law any legal obligation to give advice or give correct advice about immigration consequences, and rested its judgment on this holding. 253 S.W.3d 482; Pet. App. 23. Because the decision below rested on holdings about both misadvice and nonadvice, this case is an exceptionally good vehicle. Unlike many other vehicles, it gives this Court a choice of how broadly to resolve the issue. This Court can choose either to resolve the case on the misadvice issue alone or also to rule on nonadvice and the duty to advise more generally.

The decision below rested expressly on the Sixth Amendment to the U.S. Constitution and not on any adequate and independent state ground that could bar this Court's review. The circuit splits and issues have been percolating for decades, providing a wealth of guidance from lower courts and confirming that the issues will not go away on their own. And the quality of the lawyering should further assist this Court's consideration. Petitioner has assembled a strong legal team of both Kentucky counsel and newly substituted counsel of record, experienced Supreme Court counsel

at Paul, Hastings, Janofsky & Walker (formerly of Sidley & Austin) and a former law clerk to this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 2009

APPENDIX A: *Amici Curiae* Criminal and Immigration Law Professors

This Appendix provides *amici*'s titles and institutional affiliations only to identify them properly, not to imply any endorsement of the views expressed herein by *amici*'s institutions.

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JOINT APPENDIX

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(6)

No. 08-651

B884

Supreme Court, U.S.
FILED
MAY 26 2009
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

JOSE PADILLA,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

JOINT APPENDIX

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JOINT APPENDIX A

HARDIN DISTRICT COURT

[Generated: 11/2/01 10:13:38 AM]

Case No. 01-F-00423

COMMONWEALTH OF KENTUCKY,
Plaintiff,

v.

JOSE R. PADILLA
Defendant.

CASE DOCKET

DATE	PROCEEDINGS
09/17/2001	**Charge Filed** CHARGE 1 ORIGINAL ARRSTDT=09/17/01 0423310 - POSSESSION OF MARIJUANA
09/17/2001	**Charge Filed** CHARGE 2 ORIGINAL 0420750 - USE/POSSESS DRUG PARAPHERN 1ST
09/17/2001	**Charge Filed** CHARGE 3 ORIGINAL 0423210 - TRAFF MARI; 5+ LBS; 1ST OFFENSE

DATE	PROCEEDINGS
09/17/2001	**Charge Filed** CHARGE 4 ORIGINAL 0054920 - 392 FedSafeReg Driving Mot Veh
09/17/2001	**Charge Filed** CHARGE 5 ORIGINAL 0007230 - INCORRECT GROSS WEIGHT ON ID
09/17/2001	**Charge Filed** CHARGE 6 ORIGINAL 0054920 - 392 FedSafeReg Driving Mot Veh
09/19/2001	**Case Filed** DISTRICT FELONY 9-26-2001 ALL COUNTS REFER HCGJ. NO BOND. DEFT LODGED. COPY FILE COM'TH ATTY 10-31-01 NTB CGS 4 AND 6. 10-31-01 IND HCGJ CGS 1,2,3,5 01-CR-00517. PAPERS TRANSF. HCC
09/19/2001	**Scheduled Event** ARRAIGNMENT HON. KIMBERLY WINKENHOFER SHUMATE 09/19/01 at 08:30 am
09/19/2001	**Document Filed** DRIVING RECORD

DATE	PROCEEDINGS
09/19/2001	**Scheduled Event** PRELIMINARY HEARING HON. KIMBERLY WINKENHOFER SHUMATE LODGED-NO BOND 09/26/01 at 09:30 am
09/19/2001	**Document Filed** ORDER OF COMMITMENT
09/19/2001	**Document Filed** ORDER APPOINTING PUBLIC ADVOCATE
09/19/2001	**Document filed** ORDER – OTHER JUDGE ORDER AMENDING BOND TO NO BOND
09/26/2001	**Document Filed** ORDER OF COMMITMENT JUDGE FAXED HCDC
09/26/2001	**NOE TO ALL COUNSEL OF REC** Method: OTHER
10/31/2001	**Charge Disposed** CHARGE 1 ORIGINAL INDICTMENT BY GRAND JURY ARRSTDT=09/17/01 0423310 - POSSESSION OF MARIJUANA

DATE	PROCEEDINGS
10/31/2001	**Charge Disposed** CHARGE 2 ORIGINAL INDICTMENT BY GRAND JURY 0420750 - USE/POSSESS DRUG PARAPHERN 1ST
10/31/2001	**Charge Disposed** CHARGE 3 ORIGINAL INDICTMENT BY GRAND JURY 0423210 - TRAFF MARI;5+ LBS;1ST OFFENSE
10/31/2001	**Charge Disposed** CHARGE 4 ORIGINAL NO TRUE BILL RETURNED BY GRAND JRY 0054920 - 392 FedSafeReg Driving Mot Veh
10/31/2001	**Charge Disposed** CHARGE 5 ORIGINAL INDICTMENT BY GRAND JURY 0007230 - INCORRECT GROSS WEIGHT ON ID
10/31/2001	**Charge Disposed** CHARGE 6 ORIGINAL NO TRUE BILL RETURNED BY GRAND JRY 0054920 - 392 FedSafeReg Driving Mot Veh

DATE	PROCEEDINGS
10/31/2001	**Case Disposed** 42 9-26-2001 ALL COUNTS REFER HCGJ. NO BOND. DEFT LODGED. COPY FILE COM'TH ATTY 10-31-01 NTB CGS 4 AND 6. 10-31-01 IND HCGJ CGS 1,2,3,5 01-CR-00517. PAPERS TRANSF. HCC

JOINT APPENDIX B

HARDIN CIRCUIT COURT
DIVISION III

[Certified Copy 10/19/2004]

Case No. 01-CR-00517

COMMONWEALTH OF KENTUCKY,
Plaintiff,

v.

JOSE R. PADILLA
Defendant.

CASE DOCKET

DATE	PROCEEDINGS
10/31/2001	**Case Filed** CIRCUIT CRIMINAL *APPEAL FILED 9-24-04*
10/31/2001	**Scheduled Event** Nov 27 2001 at 3:00 PM ARRAIGNMENT HON. KELLY MARK EASTON *BOND $100,000. IN CUSTODY*

DATE	PROCEEDINGS
10/31/2001	**Charge Filed** 0423310 POSSESSION OF MARIJUANA Citation: 1C5416952-1 Citation Date: 11/19/2001 CHARGE 1 ORIGINAL
10/31/2001	**Charge Filed** 0420750 USE/POSSESS DRUG PARAPHERNALIA, 1ST OFFENSE Citation: 1C5416952-2 Citation Date: 11/19/2001 CHARGE 2 ORIGINAL
10/31/2001	**Document Filed** INDICTMENT
10/31/2001	**Charge Filed** 0423210 TRAFFIC IN MARIJUANA, > 5 LBS - 1ST OFFENSE Citation: 1C5416952-3 Citation Date: 11/19/2001 CHARGE 3 ORIGINAL

DATE	PROCEEDINGS
10/31/2001	**Charge Filed** 0007230 **OBS** INCORRECT GROSS WEIGHT ON VEHICLE ID CARDS Citation: 1A7567491-1 Citation Date: 11/19/2001 CHARGE 4 ORIGINAL
10/31/2001	**Cross Reference** DI 01-F-00423 GDJ
11/02/2001	**Bail Set** $ 100,000.00 CASH
11/19/2001	**Document Filed** DISTRICT COURT FILE *01-F-00423 EDC*
12/12/2001	**Document Filed** ORDER OF ARRAIGNMENT - NOT GUILTY PLEA *DEF PLEA NG - PC 1-22-02 AT 1:15PM - PAY PA FEE 50.00 & 2.50 DCE - BOND REMAINS THE SAME - COPIES HD CHB COM'TH ATTY, Q PEARL, JR*

DATE	PROCEEDINGS
12/12/2001	**NOE to All Counsel of Record and Parties Not Represented by Counsel.** ORDER OF ARRAIGNMENT - NOT GUILTY PLEA HAND DELIVERY *DEF PLEA NG - PC 1-22-02 AT 1:15PM - PAY PA FEE 50.00 & 2.50 DCE - BOND REMAINS THE SAME -COPIES HD CHB COM'TH ATTY, Q PEARL, JR*
12/12/2001	**Document Filed** ORDER FOR DISCOVERY *PARTIES GRANT DISCOVERY - COM'TH BY 1-22-02 AND DEF BY 2-19-02 - COPIES HD CHB COM'TH ATTY, Q PEARL, JR*
12/12/2001	**NOE to All Counsel of Record and Parties Not Represented by Counsel.** ORDER FOR DISCOVERY HAND DELIVERY *PARTIES GRANT DISCOVERY - COM'TH BY 1-22-02 AND DEF BY 2-19-02 - COPIES HD CHB COM'TH ATTY, Q PEARL, JR*

DATE	PROCEEDINGS
12/12/2001	**Scheduled Event** Jan 22 2002 at 1:15 PM PRETRIAL CONFERENCE HON. KELLY MARK EASTON
02/05/2002	**Document Filed** TENDERED DOCUMENT *ORDER SETTING TRIAL*
02/08/2002	**Document Filed** ORDER SETTING TRIAL / HEARING *for jury trial 5-21-02. at 9:00. copy to com'th atty. and q. pearl jr.*
02/08/2002	**NOE to All Counsel of Record and Parties Not Represented by Counsel.** ORDER SETTING TRIAL / HEARING HAND DELIVERY *for jury trial 5-21-02, at 9:00. copy to com'th atty. and q. pearl jr.*

DATE	PROCEEDINGS
02/12/2002	**Scheduled Event** at 09:00 AM JURY TRIAL HON. KELLY MARK EASTON SET FOR 5-21-02 - WRONG DATE - NEW ORDER ENTERED 2-12-02 SET FOR 3-21-02
02/12/2002	**Document Filed** ORDER SETTING TRIAL / HEARING *CORRECT TRIAL DATE IS 3-21-02 AT 9AM, COPIES HD CHB COMTH ATTY, Q PEARL, JR*
02/12/2002	**NOE to All Counsel of Record and Parties Not Represented by Counsel.** ORDER SETTING TRIAL / HEARING HAND DELIVERY
02/14/2002	**Document Filed** TENDERED DOCUMENT CA *AGREED ORDER*

DATE	PROCEEDINGS
02/19/2002	**Scheduled Event** at 09:00 AM JURY TRIAL HON. KELLY MARK EASTON *CONT. TO 5-31-02 AT 9:00*
02/19/2002	**Document Filed** ORDER-AGREED *FOR JURY TRIAL CONT. TO 5-31-02 AT 9:00. COPY HDCHB TO COM'TH ATTY. Q. PEARL JR*
02/19/2002	**NOE to All Counsel of Record and Parties Not Represented by Counsel.** ORDER - AGREED HAND DELIVERY *FOR JURY TRIAL CONT TO 5-31-02 AT 9:00. COPY HDCHB TO COM'TH ATTY. Q. PEARL JR.*
02/19/2002	**Scheduled Event** May 31 2002 at 09:00 AM JURY TRIAL HON. KELLY MARK EASTON
05/01/2002	**Motion Filed** MOTION TO SUPPRESS ATTORNEY-PUBLIC ADVOCATE *WITH TEND. ORDER*

DATE	PROCEEDINGS
05/06/2002	**Scheduled Event** May 21 2002 at 1:15 PM MOTION HOUR HON. KELLY MARK EASTON
05/21/2002	**Document Filed** MISCELLANEOUS *COPY OF DOCKET MARKED - HEARING ON MOTION TO SUPRESS MAY 28, 2002 AT 8AM - COPIES HD CHB COM'TH, Q PEARL, JR*
05/23/2002	**NOE to All Counsel of Record and Parties Not Represented by Counsel.** MISCELLANEOUS HAND DELIVERY *COPY OF DOCKET MARKED - HEARING ON MOTION TO SUPRESS MAY 28, 2002 AT 8AM - COPIES HD CHB COM'TH, Q PEARL, JR*
05/23/2002	**Scheduled Event** May 28 2002 at 08:00 AM SUPPRESSION HEARING HON. KELLY MARK EASTON

DATE	PROCEEDINGS
05/28/2002	**Document Filed** EXHIBIT CA *EXHIBITS # 1& 2*
05/29/2002	**Document Filed** ORDER - OTHER *DEF'S CONSENT TO SEARCH WA VALID, THE MOTION TO SUPPRESS BE DENIED, SEE ORDER FOR OTHER DETAILS, COPIES HD CHB COM'TH, Q PEARL*
05/29/2002	**NOE to All Counsel of Record and Parties Not Represented by Counsel.** ORDER - OTHER HAND DELIVERY *DEF'S CONSENT TO SEARCH WA VALID, THE MOTION TO SUPPRESS BE DENIED, SEE ORDER FOR OTHER DETAILS, COPIES HD CHB COM'TH, Q PEARL*
05/30/2002	**Document Filed** PRETRIAL COMPLIANCE CA *SUPPLEMENTAL*

DATE	PROCEEDINGS
06/03/2002	**Document Filed** TENDERED DOCUMENT *ORDER, TEND. AFTER DATE*
06/06/2002	**Scheduled Event** Aug 22 2002 at 09:00 AM JURY TRIAL HON. KELLY MARK EASTON
06/06/2002	**Document Filed** ORDER SETTING TRIAL / HEARING *SET FOR 8-22-02 AT 9. COPY HDCHB TO COM'TH ATTY, AND Q. PEARL, JR.*
06/06/2002	**NOE to All Counsel** of **Record and Parties Not Represented by Counsel.** ORDER SETTING TRIAL / HEARING HAND DELIVERY *SET FOR 8-22-02 AT 9. COPY HDCHB TO COM'TH ATTY, AND Q. PEARL, JR.*
08/22/2002	**Motion Filed** MOTION TO ENTER GUILTY PLEA ATTORNEY-PUBLIC ADVOCATE

DATE	PROCEEDINGS
08/22/2002	**Document Filed** COMMONWEALTH OFFER ON A PLEA OF GUILTY CA
09/04/2002	**Document Filed** TENDERED DOCUMENT CA *ORDER - (GUILTY PLEA)*
09/11/2002	**Charge Disposed** 0007230 **OBS** INCORRECT GROSS WEIGHT ON VEHICLE ID CARDS CHARGE 4 ORIGINAL DISMISSAL BY MOTION OF PROSECUTOR
09/11/2002	**Document Filed** JUDGMENT ON PLEA OF GUILTY *DIS CT 4, PLEA G POSS OF MARJ, POSS OF DRUG PARA, TRAFF IN MARJ, SENT SET FOR 9-17-02 AT 1:15PM, COPIES HD CHB COMTH, Q PEARL, JR, PT, PROB*

DATE	PROCEEDINGS
09/11/2002	**NOE to All Counsel of Record and Parties Not Represented by Counsel.** JUDGMENT ON PLEA OF GUILTY HAND DELIVERY *DIS CT 4, PLEA G POSS OF MARJ, POSS OF DRUG PARA, TRAFF IN MARJ, SENT SET FOR 9-17-02 AT 1:15PM, COPIES HD CHB COMTH, Q PEARL, JR, PT, PROB*
09/11/2002	**Scheduled Event** Sep 17 2002 at 1:15 PM SENTENCING HON. KELLY MARK EASTON
09/11/2002	**Sentence Imposed** *DEF TO SERVE 5 YR, THEN PROB, CT 1 & 2 RUN CONCUR W CT 3 BUT CONSEC W ANY OTHER SENT, SEE JUDGMENT FOR OTHER DETAILS*

DATE	PROCEEDINGS
09/11/2002	**Sentence Imposed** *SEE CT 1 FOR FEES & COSTS, CT 1 & 2 RUN CONCURD W CT 3, BUT CONSEC W ANY OTHER SENT, SENT TOTAL 10 YRS, SERVE 5 YRS, PROB BAL, SEE JUDGMENT FOR OTHER DETAILS*
09/11/2002	**Sentence Imposed** *SEE CT 1 FOR FEES & COSTS, CT 1 & 2 RUN CONCURD W CT 3 BUT CONSEC W ANY OTHER SENT, SENT TOTAL 10 YRS, SERVE 5 YRS BAL PROB SEE JUDGMENT FOR OTHER DETAILS*
09/17/2002	**Document Filed** PRESENTENCE INVESTIGATION REPORT *SEE CLERK'S CONFIDENTAL FILE*
10/03/2002	**Document Filed** TENDERED DOCUMENT CA *JUDGMENT AND ORDER IMPOSING SENTENCE*

DATE	PROCEEDINGS
10/04/2002	**Case Disposed** 338 Days *APPEAL FILED 9-24-04*
10/04/2002	**Charge Disposed** 0423310 POSSESSION OF MARIJUANA CHARGE 1 ORIGINAL GUILTY
10/04/2002	**Charge Disposed** 0420750 USE/POSSESS DRUG PARAPHERNALIA, 1ST OFFENSE CHARGE 2 ORIGINAL GUILTY
10/04/2002	**Charge Disposed** 0423210 TRAFFIC IN MARIJUANA, > 5 LBS - 1ST OFFENSE CHARGE 3 ORIGINAL GUILTY

DATE	PROCEEDINGS
10/04/2002	**Document Filed** JUDGMENT / SENTENCE - PLEA OF GUILTY *D GUILTY POSS OF MARJ, POSS OF DRUG PAR, TRAF IN MARJ, SENT TOTAL 10 YRS, SERVE 5 YRS, PROB, SEE JUDG FOR OTHER DETAILS, C HD CHB COM'TH, Q PEARL, JR, PT, PROB, HCSD, FCM JAILER, WARDEN*
10/04/2002	**NOE to All Counsel of Record and Parties Not Represented by Counsel.** JUDGMENT / SENTENCE - PLEA OF GUILTY OTHER *D GUILTY POSS OF MARJ, ROSS OF DRUG PAR, TRAF IN MARJ, SENT TOTAL 10 YRS, SERVE 5 YRS, PROB, SEE JUDG FOR OTHER DETAILS, C HD CHB COM'TH, Q PEARL, JR, PT, PROB, HCSD, FCM JAILER, WARDEN*
12/13/2002	**Document Filed** TENDERED DOCUMENT CA *AGREED ORDER*

DATE	PROCEEDINGS
12/30/2002	**Document Filed** ORDER - AGREED *DEF SHALL PAY TO CW ATTY $12,000.00 & UPON PAYMENT OF FUNDS SHALL RET 1995 FREIGHTLINER AND TRAILER. SEE ORDER FOR FURTHER DETAILS. COPIES HDCHB TO CW ATTY, Q PEARL, & KY MOTOR*
12/30/2002	**NOE to All Counsel of Record and Parties Not Represented by Counsel.** ORDER - AGREED OTHER *DEF SHALL PAY TO CW ATTY $12,000.00 & UPON PAYMENT OF FUNDS SHALL RET 1995 FREIGHTLINER AND TRAILER. SEE ORDER FOR FURTHER DETAILS. COPIES HDCHB TO CW ATTY, Q PEARL, & KY MOTOR*
01/29/2003	**Motion Filed** MOTION TO SUSPEND (FURTHER EXECUTION OF SENTENCE) ATTORNEY-PRIVATE *W TEND ORDERS*

DATE	PROCEEDINGS
02/05/2003	**Scheduled Event** at 00:00 MOTION NOT REQUIRING HEARING HON. KELLY MARK EASTON
02/05/2003	**Document Filed** ORDER AMENDING *KY VEHICLE ENFORCEMENT MAY DISPOSE OF ITEMS LISTED, SEE ORDER FOR OTHER DETAILS COPIES HD CHB COM'TH, Q PEARL, JR, FCM KY VEH ENFORCEMENT*
02/05/2003	**NOE to All Counsel of Record and Parties Not Represented by Counsel.** ORDER AMENDING OTHER *KY VEHICLE ENFORCEMENT MAY DISPOSE OF ITEMS LISTED, SEE ORDER FOR OTHER DETAILS, COPIES HD CHB COM'TH, Q PEARL, JR, FCM KY VEH ENFORCEMENT*

DATE	PROCEEDINGS
02/11/2003	**Document Filed** ORDER DENYING *MOTION FOR SHOCK* *PROBATION IS DENIED.* *COPIES HDCHB TO CW ATTY, Q* *PEARL, PROB & PT.*
02/11/2003	**NOE to All Counsel of Record and Parties Not Represented by Counsel.** ORDER DENYING HAND DELIVERY *MOTION FOR SHOCK* *PROBATION IS DENIED.* *COPIES HDCHB TO CW ATTY, Q* *PEARL, PROB & PT.*
03/11/2003	**Document Filed** TENDERED DOCUMENT CA *ORDER OF RELEASE OF* *PROPERTY*
04/08/2003	**Document Filed** ORDER - OTHER *RELEASE OF BRIEFCASE AND* *ITS CONTENTS TO THE DEFT.* *OR AGENT. COPIES HD CHB TO* *COMTH ATTY, Q. PEARL, JR.* *AND FCM TO KMVE.*

DATE	PROCEEDINGS
04/08/2003	**NOE to All Counsel of Record and Parties Not Represented by Counsel.** ORDER - OTHER OTHER *RELEASE OF BRIEFCASE AND ITS CONTENTS TO THE DEFT. OR AGENT. COPIES HD CHB TO COMTH ATTY, Q. PEARL, JR. AND FCM TO KMVE.*
08/18/2004	**Motion Filed** MOTION TO VACATE ATTORNEY-PRO SE *FOR RCR 11.42 MOTION - COPIES HD C HB COM'TH ATTY, FCM ATTY GENERAL*
08/18/2004	**Motion Filed** MOTION - OTHER ATTORNEY-PRO SE *FOR EVIDENTIARY HEARING & FOR PERSONAL APPEARANCE*
08/18/2004	**Motion Filed** MOTION - OTHER ATTORNEY-PRO SE *FOR APPOINTMENT OF COUNSEL W ATTACHMENTS*

DATE	PROCEEDINGS
08/18/2004	**Document Filed** AFFIDAVIT OF INDIGENCY APS *W TEND OI*
08/18/2004	**Charge Filed** 0026070 MOTION TO VACATE SENTENCE, SET ASIDE OR CORRECT SE Citation: NA Citation Date: CHARGE 5 ORIGINAL *RCR 11.42*
08/19/2004	**Scheduled Event** Sep 9 2004 at 06:15 AM REVIEW HON. KELLY MARK EASTON *SUBMIT FILE ON 11.42*
09/14/2004	**Charge Disposed** 0026070 MOTION TO VACATE SENTENCE, SET ASIDE OR CORRECT SE CHARGE 5 ORIGINAL DENIED *RCR 11.42*
09/14/2004	**Document Filed** ORDER DENYING *RCR 11.42 MOTION IS DENIED.* *COPIES AS LISTED.*

DATE	PROCEEDINGS
09/14/2004	**NOE to All Counsel of Record and Parties Not Represented by Counsel.** ORDER DENYING OTHER *RCR 11.42 MOTION IS DENIED. COPIES AS LISTED.*
09/23/2004	**Motion Filed** MOTION TO PROCEED IN FORMA PAUPERIS ATTORNEY-PRO SE *W TEND ORDER & TEND NOTICE OF APPEAL*
09/23/2004	**Motion Filed** MOTION - OTHER ATTORNEY-PRO SE *FOR APPOINTMENT OF COUNSEL ON APPEAL W TEND ORDER*
09/23/2004	**Motion Filed** MOTION - OTHER ATTORNEY-PRO SE *FOR COMPLIANCE PURSUANT TO CR 75.0 7(4) W TEND ORDER*
09/23/2004	**Document Filed** AFFIDAVIT OF INDIGENCY APS *W TEND OI*

DATE	PROCEEDINGS
09/23/2004	**Document Filed** DESIGNATION OF RECORD APS
09/24/2004	**Document Filed** ORDER- OTHER *DEF IS ALLOWED TO FILE APPEAL IN FORMA PAUPERIS & APPT OF COUNSEL IS GRANTED, CFCM J PADILLA, DEPT OF PUB ADV, Q PEARL JR, COM'TH ATTY, ATTY GENERAL, G M GEOGHEGAN, III, CLERK, KY CT OF APPEALS*
09/24/2004	**NOE to All Counsel of Record and Parties Not Represented by Counsel.** ORDER-OTHER FIRST CLASS MAIL *DEF IS ALLOWED TO FILE APPEAL IN FORMA PAUPERIS & APPT OF COUNSEL IS GRANTED, C FCM J PADILLA, DEPT OF PUB ADV, Q PEARL JR, COM'TH ATTY, ATTY GENERAL, G M GEOGHEGAN, III, CLERK, KY CT OF APPEALS*

DATE	PROCEEDINGS
09/24/2004	**Document Filed** NOTICE OF APPEAL APS *OF JOSE R PADILLA FILED & C FCM J PADILLA, DEPT OF PUB ADV, Q PEARL JR, COM'TH ATTY, ATTORNEY GENERAL, G M GEOGHEGAN, III, CLERK, KY CT OF APPEALS*
09/24/2004	**NOE to All Counsel of Record and Parties Not Represented by Counsel.** NOTICE OF APPEAL FIRST CLASS MAIL *OF JOSE R PADILLA FILED & C FCM J PADILLA, DEPT OF PUB ADV, Q PEARL JR, COM'TH ATTY, ATTORNEY GENERAL, G M GEOGHEGAN, III, CLERK, KY CT OF APPEALS*
09/27/2004	**Document Filed** TAPE *W CERTIFICATION OF RECORD ON APPEAL*
10/07/2004	**Document Filed** CORRESPONDENCE APA *FROM DEPT OF PUBLIC ADV IN REF TO CERT OF CASE*

DATE	PROCEEDINGS
10/12/2004	**Document Filed** DESIGNATION OF RECORD APA
10/19/2004	**Document Filed** NOTICE OF CERTIFICATION OF RECORD ON APPEAL *CERT OF RECORD ON APPEAL, NOTICE OF APPEAL CERTIFIED, C FCM J PADILLA; DEPT OF PUBLIC ADV; Q PEARL, JR ; C SHAW, COM'TH ATTY; ATTY GEN; G M GEOGHEGAN, III, CLERK, KY CT OF APPEALS*
10/19/2004	**NOE to All Counsel of Record and Parties Not Represented by Counsel.** NOTICE OF CERTIFICATION OF RECORD ON APPEAL FIRST CLASS MAIL *CERT OF RECORD ON APPEAL, NOTICE OF APPEAL CERTIFIED, C FCM J PADILLA; DEPT OF PUBLIC ADV; Q PEARL, JR ; C SHAW, COM'TH ATTY; ATT'Y GEN; G M GEOGHEGAN, III, CLERK, KY CT OF APPEALS*

JOINT APPENDIX C

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 2004-CA-001981

Appeal from Hardin Circuit Court
Honorable Kelly M. Easton, Judge
Action No. 01-CR-00517

JOSE R. PADILLA

Appellant,

v.

COMMONWEALTH OF KENTUCKY,

Appellee.

CASE DOCKET

DATE	PROCEEDINGS
09/14/2004	Circuit Court Judgment
09/24/2004	Notice Of Appeal - Criminal
10/19/2004	Notif. Of Certification (Reg.-Criminal)
10/20/2004	Record Request From Circuit Court Clrk
10/25/2004	Record Filed
10/29/2004	Inform Public Advocate That Record Filed

DATE	PROCEEDINGS
12/07/2004	Appeal Perfected
02/07/2005	Appellee Brief Filed
02/07/2005	Substantive Motion
02/22/2005	Motions Scheduled For Following Steps.
02/23/2005	Late Letter - Return Of Pleading On Court's Own Motion
02/25/2005	Procedural Motion
03/11/2005	Motions Scheduled For Following Steps.
03/14/2005	Order Granting Procedural Motion
03/14/2005	Case Abated By Court Order
03/28/2005	Order Granting Procedural Motion
03/28/2005	Appellant's Reply Brief
10/05/2005	Return To Active Docket Court Order Delivered, Returning This Case To The Active Docket.
10/05/2005	Submission
11/08/2005	Appeal Assigned On The Merits Assigned Month:03/2006 Presiding Judge:Combs Sara Walter Panel:1 Note:

DATE	PROCEEDINGS
12/29/2005	Assign/Schedule (Date, Time & Location) Date:03/08/2006 Time:09:30 AM Location:Jefferson County Judicial Center, 10th Floor Appellate Courtroom, 700 West Jefferson, Louisville, Kentucky Note:
02/13/2006	Record Returned From Judge's Chambers. Judge Combs Returned 1 Brown Case Folder On 2/7/06.
03/08/2006	Procedural Motion Appellant Counsel's Motion To Respond In Some Format. (3 Copies To Js)
03/21/2006	Motions Scheduled For Following Steps.
03/31/2006	Opinion - Vacating & Remanding Opinion Vacating And Remanding Combs Dyche (Concurs) And Henry (Dissents And Files Separate Opinion) To Be Published 12 Pages
03/31/2006	Order Denying Procedural Motion Order The Court Orders That The Appellant Counsel's Motion To Respond In Some Format To Any Questions The Panel May Have Regarding The Merits Of The Appeal Is Hereby Denied As Moot In Light Of The Opinion Rendered.

DATE	PROCEEDINGS
05/01/2006	Disc. Review Filed KY Supreme Court Motion For Discretionary Review Filed In Supreme Court. 2006-SC-321-D
08/17/2006	Disc. Review Granted By Supreme Ct. Order Granting Discretionary Review In Supreme Court. 2006-SC-321-D
06/20/2008	Finality

JOINT APPENDIX D

SUPREME COURT OF KENTUCKY

2006-SC-000321-DG

On Review From The Court Of Appeals
Case Number 2004-CA-001981
Hardin Circuit Court No. 01-CR-000517

COMMONWEALTH OF KENTUCKY,
Appellant,

v.

JOSE R. PADILLA
Appellee.

CASE DOCKET

DATE	PROCEEDINGS
09/14/2004	JUDGMENT / ORIGINAL ACTION DATE: **JD**
05/01/2006	MOTION FOR DISCRETIONARY REVIEW (CRMN.): **DR** No Filing Fee Required; Court Of Appeals Opinion Rendered March 31, 2006; P. **(Due Date: 05/31/2006)**
05/17/2006	RESPONSE TO MOTION FOR DISC. REVIEW: **RS** Respondent Filed Response To Motion For Discretionary Review.

DATE	PROCEEDINGS
05/17/2006	READY - DISCRETIONARY REVIEW: **R5**
05/17/2006	SENT OUT FOR ASSIGNMENT: **SH**
08/17/2006	ORDER GRANTING DISC. REVIEW: **DG** Case Will Stand Submitted Following Briefing. No Oral Argument Will Be Scheduled. **(Due Date: 10/16/2006)**
08/23/2006	RECORD FILED: **RF** 1 Volume Record, 1 Video Tape, 1 Video Tape Copy, And Court Of Appeals' Record.
08/28/2006	RECORD CHECKED OUT: **RCDOUT** 1 Volume Record, 1 Video Tape Copy Checked Out To Attorney General's Office.
09/13/2006	MISCELLANEOUS MOTIONS: **MM** Hon. Damon L. Preston Filed Motion To Add Hon. Timothy G. Arnold As Co-Counsel For Appellant. **(Due Date: 09/26/2006)**
09/27/2006	SCHEDULE TO MOTION DOCKET: **MS** No Response Filed

DATE	PROCEEDINGS
09/29/2006	MISC MOTION ORDER: **OM** Order Granted Appellee's Motion To Add Hon. Timothy G. Arnold As Co-Counsel Of Record With Hon. Richard E. Neal.
10/16/2006	MOTION FOR EXT.OF TIME (13 DAY RESPONSE): **ME** Appellant, Commonwealth Of Kentucky, Filed Motion For An Extension Of Time, To And Including November 15, 2006, In Which To File Its Brief. **(Due Date: 10/29/2006)**
10/31/2006	SCHEDULE TO MOTION DOCKET: **MS** No Response Filed.
11/02/2006	ORDER FOR EXTENSION OF TIME: **OE** Order Granted Appellant's Motion For An Extension Of Time, To And Including November 15, 2006, In Which To File Its Brief. **(Due Date: 11/15/2006)**
11/15/2006	APPEAL PERFECTED (AFTER D. R. GRANTED): **DP** 1 Volume Record, 1 Video Tape Copy Returned By Attorney General's Office. **(Due Date: 01/14/2007)**

DATE	PROCEEDINGS
11/15/2006	RECORD CHECKED OUT: **RCDOUT** 1 Volume Record, 1 Video Tape Copy Checked Out To Dept. Of Public Advocacy.
12/08/2006	MOTION AS TO BRIEFING: **MB** Appellee Filed Motion To Strike Brief For Appellant, Commonwealth Of Kentucky. **(Due Date: 12/21/2006)**
12/15/2006	RESPONSE TO MOTION AS TO BRIEFING: **ZB** Appellant Filed Response To Motion To Strike Brief For Appellant, Commonwealth Of Kentucky.
12/15/2006	SCHEDULE TO MOTION DOCKET: **MS**
01/16/2007	MOTION FOR EXT. OF TIME (13 DAY RESPONSE): **ME** Appellee Filed Motion For An Extension Of Time Of Thirty (30) Days From The Date Of The Order Ruling On The Motion To Strike Brief For Commonwealth In Which To File His Brief. **(Due Date: 01/29/2007)**

DATE	PROCEEDINGS
01/30/2007	SCHEDULE TO MOTION DOCKET: **MS** No Response Filed.
02/12/2007	ORDER ON COURTS OWN MOTION: **BC** Appellee's Motion To Strike The Appellant's Brief Is Passed To The Consideration Of The Merits Of The Appeal.
02/12/2007	ORDER FOR EXTENSION OF TIME: **OE** Order Granted Appellee's Motion For An Extension Of Time In Which To File His Brief. Appellee Shall File His Brief Within 30 Days Of The Date Of The Entry Of This Order. **(Due Date: 03/14/2007)**
03/14/2007	MOTION FOR EXT. OF TIME (13 DAY RESPONSE): **ME** Appellee File Motion For An Extension Of Time, To And Including May 3, 2007, In Which To File His Brief. **(Due Date: 03/27/2007)**
03/28/2007	SCHEDULE TO MOTION DOCKET: **MS** No Response Filed.

DATE	PROCEEDINGS
03/28/2007	ORDER FOR EXTENSION OF TIME: **OE** Order Granted Appellee's Motion For An Extension Of Time, To And Including May 3, 2007, In Which To File His Brief As A Final Extension Of Time. **(Due Date: 05/03/2007)**
05/03/2007	MOTION FOR EXT. OF TIME (13 DAY RESPONSE): **ME** Appellee Filed Motion For 7 Day Extension Of Time, To And Including May 10, 2007, In Which To File The "Brief For Appellee". **(Due Date: 05/16/2007)**
05/10/2007	**NOTE**: **CK** Tendered 11 Copies Of Appellee Brief. (1 Volume Record, 1 Video Tape Copy Returned By The Department Of Public Advocacy)
05/17/2007	SCHEDULE TO MOTION DOCKET: **MS** No Response Filed.
05/21/2007	ORDER FOR EXTENSION OF TIME: **OE** Order Granted Appellee's Motion For An Extension Of Time In Which To File His Brief And The Heretofore Tendered Brief Is Filed.

DATE	PROCEEDINGS
05/21/2007	APPELLEE BRIEF FILED: **AB** Appellee Brief Filed. **(Due Date: 06/05/2007)**
06/05/2007	APPELLANT'S REPLY BRIEF FILED: **RB** Appellant's Reply Brief Filed With CD.
06/05/2007	READY (ON MERITS OF APPEAL): **R3**
06/05/2007	SENT OUT FOR ASSIGNMENT: **SH**
01/16/2008	ORDER AS TO BRIEFS: **OB** Order Denied Appellee's Motion To Strike The Appellant's Brief.
01/24/2008	OPINION REVERSING: **PR** By Chief Justice Lambert. *All Concur, Except Cunningham, J., Dissents By Separate Opinion In Which Schroder, J., Joins. *To Be Published* **(Due Date: 02/13/2008)**
02/13/2008	MOTION FOR EXT. OF TIME (13 DAY RESPONSE): **ME** Appellee Filed Motion For Extension Of Time, To And Including February 18, 2008 In Which To File The Petition For Rehearing. **(Due Date: 02/26/2008)**

DATE	PROCEEDINGS
02/19/2008	** NOTE **: **CK** Tendered 11 Copies Of Appellee's Petition For Rehearing.
02/27/2008	SCHEDULE TO MOTION DOCKET: **MS** No Response Filed.
02/27/2008	ORDER FOR EXTENSION OF TIME: **OE** Order Granted Appellee's Motion For An Extension Of Time In Which To File The Petition For Rehearing And The Heretofore Tendered Petition For Rehearing Is Filed.
02/27/2008	PETITION FOR REHEARING: **RH** Appellee's Petition For Rehearing Filed Pursuant To Court Order. **(Due Date: 03/18/2008)**
03/18/2008	RESPONSE TO PETITION FOR REHEARING: **HR** Appellant Filed Response To Petition For Rehearing.
03/19/2008	SENT OUT FOR ASSIGNMENT: **SH**
06/19/2008	ORDER DENYING REHEARING: **RD** FINALITY – Appellee's Petition For Rehearing Is Petition For Denied.

DATE	PROCEEDINGS
06/19/2008	PUBLICATION LETTER: **FLPUBL**
06/19/2008	FINALITY: **FL** Returned To Hardin Co. Circuit Court Clerks Office, 1 Volume Record, 1 Video Tape, 1 Video Tape Copy, By U.P.S., And 1 Volume Court Of Appeals' Record To Court Of Appeals By Messenger.
09/18/2008	** NOTE **: **CK** Received Notice From U.S. Supreme Court A Motion For Extension Of Time Was Granted Until November 16, 2008, To File A Petition For Writ Of Certiorari.
11/20/2008	** NOTE **: **CK** Received Notice From U.S. Supreme Court Petition For Writ Of Certiorari Was Filed On November 14, 2008, And Placed On The Docket November 18, 2008, As No. 08-651.
02/26/2009	** NOTE **: **CK** Received Notice From U.S. Supreme Court Petition For Writ Of Certiorari No. 08-651 Was Granted On February 23, 2009.

JOINT APPENDIX E

COMMONWEALTH OF KENTUCKY
HARDIN DISTRICT COURT

NO. 01-F-00423 — ELIZABETHTOWN DIVISION

COMMONWEALTH OF KENTUCKY — *PLAINTIFF,*

VS. **ORDER**

JOSE RAMON PADILLA — *DEFENDANT.*

* * * * *

This matter having come on before the court on court's own motion after telephonic request of the Motor Vehicle Enforcement,

IT IS HEREBY ORDERED that defendant's bond shall be changed from $25,000.00 cash to **no bond** status as defendant is believed to be an illegal alien and is awaiting deportation by the Federal authorities.

This [19th] day of September, 2001.

[Kimberly Winkenhofer Shumate]
KIMBERLY WINKENHOFFER SHUMATE
JUDGE, HARDIN DISTRICT COURT

JOINT APPENDIX F

U.S. Department of Justice
Immigration and Naturalization Service

Immigration Detainer -
Notice of Action

File No. Axx xxx xxx
Date: 9/20/01

TO (Name and title of institution)
Jailer
Hardin County Jail

FROM: (INS office address)
Immigration & Naturalization Service
601 W. Broadway, Rm# 601
Louisville, Kentucky 40202

Name of alien: Padilla-Carbajal, Jose Ramon
[FBI# 58690CB0]

Data of birth: 11/18/1950

Nationality: Honduran Sex: M

You are advised that the action noted below has been taken by the Immigration and Naturalization Service concerning the above-named inmate of your institution:

☒ Investigation has been initiated to determine whether this person is subject to removal from the United States.

☐ A Notice to Appear or other charging document initiating removal proceedings, a copy of which is attached, was served on _____
(Date)

☐ A warrant of arrest in removal proceedings, a copy of which is attached, was served on _____
(Date)

☐ Deportation or removal from the United States has been ordered.

It is requested that you:

Please accept this notice as a detainer. This is for notification purposes only and does not limit your discretion in any decision affecting the offender's classification, work and quarters assignments, or other treatment which he or she would otherwise receive.

☒ Federal regulations (8 CFR 287.7) require that you detain the alien for a period not to exceed 48 hours (excluding Saturdays, Sundays and Federal holidays) to provide adequate time for INS to assume custody of the alien. You may notify INS by calling (502)582-6526 during business hours or [(502)332-7156] after hours in an emergency.

☒ Please complete and sign the bottom block of the duplicate of this form and return it to this office.
☐ A self-addressed stamped envelope is enclosed for your convenience. ☒ Please return a signed copy via facsimile to (502)582-6373
(Area code and facsimile number)

Return fax to the attention of
[THOMAS E. PERRYMAN],
(Name of INS officer handling case)
at (502)582-6526 [X246]
(Area code and phone number)

☒ Notify this office of the time of release at least 30 days prior to release or as far in advance as possible.

☒ Notify this office in the event of the inmate's death or transfer to another institution.

☐ Please cancel the detainer previously placed by this Service on _____.

[Thomas E. Perryman]
Thomas E. Perryman Officer in Charge
(Signature of INS official) (Title of INS official)

Receipt acknowledged:

Date of latest conviction: _____
Latest conviction charge: _____
Estimated release date: _____

Signature and title of official:_____

JOINT APPENDIX G

THE COMMONWEALTH OF KENTUCKY

HARDIN CIRCUIT COURT, NINTH JUDICIAL CIRCUIT
DIVISION NO. [III]
INDICTMENT NO. 01-CR-[00517]

August Term, 2001
October, 2001, Session

The Commonwealth Of Kentucky
Against
JOSE R. PADILLA

1. Possession of Marijuana; Class "A" Misdemeanor
2. Possession of Drug Paraphernalia; Class "A" Misdemeanor
3. Trafficking in Marijuana, Greater Than Five Pounds; Class "C" Felony
4. Operating Without a Weight and Distance Tax Number; Violation

---

CHARGE

1. K.R.S. 218A.1422
2. K.R.S. 218A.500(2)
3. K.R.S. 218A.1421(a)
4. K.R.S. 138.720(3)

The Grand Jurors of the County of Hardin, the name and by the authority of the Commonwealth of Kentucky, charge:

COUNT 1: That on or about the 17th day of September, 2001, in Hardin County, Kentucky, the above named Defendant committed the offense of Possession of Marijuana when he knowingly and unlawfully possessed a quantity of marijuana in a semi-tractor cab at the weigh station on I-65, Elizabethtown, Kentucky.

COUNT 2: That on or about the 17th day of September, 2001, in Hardin County, Kentucky, the above named Defendant committed the offense of Possession of Drug Paraphernalia when he possessed with the intent to use drug paraphernalia in the form of a pipe filled with marijuana and rolling papers for the purpose of planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance.

COUNT 3: That on or about the 17th day of September, 2001, in Hardin County, Kentucky, the above named Defendant committed the offense of Trafficking in Marijuana, Greater Than 5 Pounds, when he knowingly and unlawfully trafficked in marijuana, by possessing with the intent to sell or transfer approximately 1033 pounds of marijuana in

semi-tractor trailer at the weigh station on I-65, Elizabethtown, Kentucky.

COUNT 4: That on or about the 17th day of September, 2001, in Hardin County, Kentucky, the above named Defendant committed the offense of Operating Without a Weight and Distance Tax Number when he failed to have the required weight and distance tax number (KYU number) when his declared weight on registration was in excess of 59,000 pounds..

Against the peace and dignity of the Commonwealth of Kentucky.

Witness:
Off. Cheryl Hendley,
KVD

EDC 01-F-00423

Bond
$[100,000 (in custody)]

Stand on Bond $ _____

~~Warrant on Indictment~~ _____

[T. Steven Bland]
JUDGE, NINTH
JUDICIAL CIRCUIT

A TRUE BILL

[forewoman's signature]
_____
Foreman

[10-31], 2001

RECEIVED, from the Foreman of the Grand Jury, in. their presence, and filed in open Court.

ATTEST: [Ralph Baskett, Clerk
by: JBoone, D.C.]

_____
Hardin Circuit Court
Clerk

JOINT APPENDIX H

AOC-491 Doc. Code EGP
Rev. 11-95

Case No. [01-CR-005 17]
Court [Circuit]
Division [III]
County [HARDIN]

Commonwealth of Kentucky
Court of Justice

RCr 8.08,8.10

COMMONWEALTH OF KENTUCKY *PLAINTIFF,*

VS. MOTION TO ENTER GUILTY PLEA

[*JOSE R. PADILLA*] *DEFENDANT.*

[DOB: 11-18-50] [xxx-xx-xxxx]

Comes the Defendant, in person and with aid of counsel, and respectfully moves this Court to allow him to withdraw his former plea of **"NOT GUILTY"** and enter a plea of **"GUILTY"** as set forth below. In support of this motion, the Defendant states as follows:

1. My full name is [Jose R. Padilla]. I am the same person named in the indictment.

2. My judgment is not now impaired by drugs, alcohol, or medication.

3. I have reviewed a copy of the indictment and told my attorney all the facts known to me concerning my charges. I believe he/she is fully informed about my case. We have fully discussed and I understand my charges and any possible defenses to them.

4. I understand that I may plead "NOT GUILTY" to any charge against me, in which event the Constitution would guarantee me the following rights:

(a) The right not to testify against myself;

(b) The right to a speedy and public trial by jury at which I would be represented by counsel and the Commonwealth would have to prove my guilt beyond a reasonable doubt;

(c) The right to confront and cross-examine all witnesses called to testify against me;

(d) The right to produce any evidence, including attendance of witnesses, in my favor;

(e) The right to appeal my case to a higher court.

I understand that if I plead "GUILTY," I waive these rights.

5. I understand that if I plead **"GUILTY,"** the Court may impose any punishment within the range provided by law and that although it may consider

the Commonwealth's recommendation, the Court may reject it. The legal penalty ranges are set forth on the attached "Commonwealth's Offer on a Plea of Guilty" which I have reviewed and signed.

6. I understand that if the Court rejects the plea agreement, it must so inform me. If this occurs I may either persist in my guilty plea and possibly receive harsher treatment than I bargained for or I may withdraw my guilty plea and proceed to trial. I further understand that the Court may wait until it reviews a pre-sentence report regarding the history of the case and my background before it must inform me if it will accept the plea agreement.

7. In return for my guilty plea, the Commonwealth has agreed to recommend to the Court the sentence(s) set forth in the attached "Commonwealth's Offer on a Plea of Guilty." Other than that recommendation, no one, including my attorney, has promised me any other benefit in return for my guilty plea nor has anyone forced or threatened me to plead **"GUILTY."**

JOINT APPENDIX I

AOC-491.1 Doc. Code COPG
Rev. 3-00

Case No. 01-CR-005 17
Court Circuit
Division III
County Hardin

Commonwealth of Kentucky
Court of Justice

COMMONWEALTH OF KENTUCKY *PLAINTIFF,*

VS. COMMONWEALTH'S OFFER OF A PLEA

JOSE R. PADILLA *DEFENDANT.*

1. Charge(s):	**Penalty:**
Possession of Marijuana	0 – 12 Months
Possession of Drug Paraphernalia	0 – 12 Months
Trafficking in Marijuana, Greater Than Five Pounds	5 – 10 Years
Operating Without a Weight and Distance Tax Number	Violation

2. Amended Charge(s) (If Applicable): **Penalty:**

DWOP Count 4, upon a stipulation of probable cause.

3. Facts of the case:

4. Recommendations on a Plea of Guilty (Plea Agreement):

Twelve (12) months, on the charge of Possession of Marijuana; Twelve (12) months, on the charge of Possession of Drug Paraphernalia; Ten (10) years, on the charge of Trafficking in Marijuana, Greater Than Five Pounds, with counts one (1) and two (2) running concurrently to count 3, for a total of Ten (10) years, Five to serve, and Five (5) probated. Defendant agreeing to forfeit the truck and trailer (freightliner) owned by the him.

It is expressly understood by all parties that, as an express condition of this plea, if the Defendant fails to appear for sentencing, this plea agreement provides that the sentence(s) for the criminal offense(s) herein shall be the maximum sentence allowed under existing law for each class of criminal offense.

[X J Padilla]
DEFENDANT

It is expressly understood by all parties that, as an express condition of this plea, if the Defendant fails to appear for sentencing, this plea agreement provides that the multiple counts and/or multiple cases, if any, shall be served consecutively, up to the maximum sentence allowed under existing law.

[X J Padilla]
DEFENDANT

It is expressly understood by all parties that, as an express condition of this plea, if the Defendant fails to appear for sentencing, this plea agreement provides that all the sentence(s) herein shall be to serve.

[X J Padilla]
DEFENDANT

- **THE DEFENDANT AGREES TO PAY RESTITUTION, IF ANY.**
- **ALL TIME IS TO RUN CONSECUTIVE WITH ANY OTHER SENTENCE THAT THE DEFENDANT MAY HAVE OR RECEIVE FROM ANY OTHER COURT PROCEEDING, IN THIS JURISDICTION OR ANY OTHER, UNLESS SPECIFICALLY AGREED TO OTHERWISE BEFORE ENTRY OF GUILTY PLEA.**
- **DEFENDANT AGREES TO FORFEITURE OF ANY AND ALL SEIZED PROPERTY AND/OR FUNDS UNLESS AGREED TO OTHERWISE BEFORE ENTRY OF GUILTY PLEA.**

5. Reason(s) or amended charge(s) (If Applicable):

_____

_____

_____

_____

6. Offered this _____day of _____, ____.

[M. M. Ferguson]
Commonwealth's Attorney or
Assistant Commonwealth's Attorney

[Quinn Pearl, Jr.]	[X J Padilla]
Defense Attorney	Defendant
Prosecuting Witness	Police Officer
Prosecuting Witness	Police Officer

JOINT APPENDIX J

HARDIN CIRCUIT COURT
9TH JUDICIAL CIRCUIT
DIVISION III
CASE NO. 01-CR-00517

COMMONWEALTH OF KENTUCKY — *PLAINTIFF,*

VS. — ORDER

v.

JOSE R. PADILLA — *DEFENDANT.*

This matter came before the Court on the 22nd day of August 2002, at 9:00 a.m., with the Defendant, **Jose R. Padilla**, appearing in open court with his counsel, Quinn Pearl, Jr., and the Commonwealth appearing through Michael M. Ferguson, First Assistant Commonwealth's Attorney.

The Commonwealth moved to **DISMISS** Count 4 of Indictment No. 01-CR-00517, said charge being as follows: **Operating Without a Weight and Distance Tax Number** under KRS 138.720(3), a Violation.

IT IS HEREBY ORDERED AND ADJUDGED that Count 4 of Indictment No. 01-CR-00517, said charge being as follows: **Operating Without a Weight and Distance Tax Number** under KRS 138.720(3), a Violation, be, and it is, **DISMISSED WITHOUT PREJUDICE, upon stipulation of probable cause**.

Thereupon came the Defendant, by agreement, and with advice of counsel, who filed a "Motion to Enter Guilty Plea" and entered a plea of guilty in Case No. 01-CR-00517 to the following charge(s): **Possession of Marijuana** under KRS 218A.1422, a Class "A" Misdemeanor; **Possession of Drug Paraphernalia** under KRS 218A.500(2), a Class "D" Felony; and **Trafficking in Marijuana, Greater Than Five Pounds** under KRS 218A.1421(a), a Class "C" Felony.

Defendant was interrogated by the Court, and the Court finds that the Defendant understands the charges against him, that the Defendant knowingly, intelligently, and voluntarily waives his right to a trial by jury, the privilege against self-incrimination, the right of confrontation of witnesses, and that there is a factual basis for the Defendant's plea.

IT IS ORDERED that the Petition be filed and that the Defendant's plea be accepted and entered as prayed for in the Petition and as recommended in the certificate of counsel.

IT IS THEREFORE ORDERED AND ADJUDGED that the Defendant is guilty of the following crimes: **Possession of Marijuana; Possession of Drug Paraphernalia**; and **Trafficking in Marijuana, Greater Than Five Pounds**.

The Court hereby takes notice of the Commonwealth's recommendation that the Defendant be sentenced as follows: **Twelve (12) months** on each of the charges of **Possession of**

Marijuana and **Possession of Drug Paraphernalia** under the custody of the Hardin County Detention Center; and to **Ten (10) years** on the charge of **Trafficking in Marijuana, Greater Than Five Pounds** under the custody of the Department of Corrections, with counts one (1) and to (2) to run concurrently to count three (3), **for a total of Ten (10) years, Five, to serve, and Five, probated,** with the Commonwealth recommending probation for a period of Five (5) years, said charges to running consecutively with any other sentence the Defendant may have or receive from any other court proceeding, in this jurisdiction or any other, with the Defendant agreeing to forfeit any and all seized property and/or assets, including, but not limited to the truck and trailer (freightliner) owned by him, and, as an express condition of this plea, should the Defendant fail to appear for sentencing, the sentence(s) for the criminal offense(s) herein shall be the maximum sentence allowed under existing law for each class of criminal offense pled to herein, said sentence(s) to be served, and served consecutively, and that this modified sentence condition for failure to appear for sentencing shall be to serve.

However, entry of the Judgment and Order Imposing Sentence is withheld and postponed pending a pre-sentence investigation. A hearing is set for the 17th day of September 2002, at 1:15 p.m., for imposition of sentence and the Division of Probation and Parole is hereby ordered to prepare a written report of its pre-sentence investigation on the Defendant, and is to provide a copy of the report to the Defendant's attorney, the Commonwealth's

Attorney, and this Court, prior to the above scheduled hearing.

The Defendant is to remain in custody, pending further orders of this Court.

SO ORDERED this [6th] day of September 2002.

[Kelly Mark Easton]
JUDGE, HARDIN CIRCUIT COURT
DIVISION III

TENDERED BY:

[M. M. Ferguson]
COMMONWEALTH'S ATTORNEY'S OFFICE
9th Judicial Circuit

JOINT APPENDIX K

HARDIN CIRCUIT COURT
9TH JUDICIAL CIRCUIT
DIVISION III
CASE NOS. 01-CR-00517

COMMONWEALTH OF KENTUCKY — *PLAINTIFF,*

VS. — JUDGMENT AND ORDER IMPOSING SENTENCE

JOSE R. PADILLA — *DEFENDANT.*

** ** ** ** ** **

On the 22nd day of August 2002, this Court accepted the Defendant's Plea of Guilty to the charges of **Possession of Marijuana; Possession of Drug Paraphernalia;** and **Trafficking in Marijuana, Greater Than Five Pounds** and entered an Order accepting same.

On this the 17th day of September 2002 at 1:15 p.m., the Defendant appeared in open court with his counsel, Quinn Pearl, Jr., with the Commonwealth represented by Robert W. Stevens, Assistant Commonwealth's Attorney.

The Court inquired of the Defendant and his attorney whether they had any legal cause to show why judgment should not be pronounced, and afforded the Defendant and his attorney the opportunity to make statements in the Defendant's behalf and to present any information in mitigation of punishment, and the Court having informed the

Defendant and his attorney of the factual contents and conclusions contained in the written report of the pre-sentence investigation prepared by the Division of Probation and Parole and provided Defendants' attorney with a copy of the report although not the sources of confidential information, the Defendant agreed with the factual contents of the report.

Having given due consideration of the written report by the Department of Probation and Parole, and to the nature and circumstances of the crime, and to the history, character and condition of the Defendant, the Court is of the opinion that imprisonment is necessary for the protection of the public because:

____ A. There is a substantial risk that the Defendant will commit another crime during any period of probation, probation with an alternative sentencing plan, or conditional discharge.

____ B. The Defendant is in need of correctional treatment that can be provided most effectively by the Defendant's commitment to a correctional institution.

__X__ C. Probation, probation with an alternative sentencing plan, or conditional discharge would unduly depreciate the seriousness of the Defendant's crime.

____ D. The Defendant is not eligible for probation, probation with an alternative sentencing plan, or conditional discharge because of the applicability of KRS 532.080 or KRS 533.060 or KRS 532.045 or KRS 439.3401.

____ E. The Defendant does not desire probation and waives his/her right to have probation be considered by the Court after having his/her rights explained to him/her.

No sufficient cause having been shown why judgment should not be pronounced, **IT IS ADJUDGED BY THE COURT** that the Defendant is guilty of the following crimes: **Possession of Marijuana; Possession of Drug Paraphernalia;** and **Trafficking in Marijuana, Greater Than Five Pounds,** and is **Sentenced** to **Twelve (12) months** on each of the charges of **Possession of Marijuana** and **Possession of Drug Paraphernalia** under the custody of the Hardin County Detention Center; and to **Ten (10) years** on the charge of **Trafficking in Marijuana, Greater Than Five Pounds** under the custody of the Department of Corrections, with counts one (1) and to (2) to run concurrently to count three (3), **for a total of Ten (10) years, Five, to serve, and Five, probated,** said charges to running consecutively with any other sentence the Defendant may have or receive from any other court proceeding, in this jurisdiction or any other.

The Court is of the opinion that **following service of the Five-year sentence**, the Defendant is eligible for probation, probation with an alternative sentencing plan, or conditional discharge on the remainder of that Ten-year sentence, as hereinafter ordered:

X Probationary Supervision, for a period of **Five (5) years** on the remainder of that Ten-year sentence from the date of release from incarceration, subject to the following conditions:

1. Not commit another offense;
2. Avoid injurious or vicious habit;
3. Avoid persons or places of disreputable or harmful character;
4. Work faithfully at suitable employment as far as possible;
5. Support your dependents and meet other family responsibilities;
6. Remain within the County and State specifically approved by the Probation and Parole office in Hardin County, Kentucky, in their sole discretion, subject to modification by subsequent order of this Court;
7. The Defendant shall forfeit any and all seized property and/or assets, including, but not limited to the truck and trailer (freightliner) owned by him;
8. The Defendant shall pay the following costs and fees within Ninety (90) days of the date of release from **incarceration:**

Costs	$ 50.00
Sheriff Security Fee	$ 5.00
~~Bond Fee~~	~~$ 4.00~~
Court Security Fee (Ind after 7/1/00)	$ 7.00
Court Facilities Fee (Ind after 10/1/00)	$ 25.00

Arrest Fee (excluding KSP) as follows:

~~Arrest or warrant served prior to 7/15/96~~	~~$ 10.00~~
~~Arrest or warrant served after 7/15/96~~	~~$ 20.00~~
~~Arrest without warrant (any)~~	~~$ 10.00~~
~~If convicted of misdemeanor only~~	~~$ 10.00~~

Fees for Misdemeanor Convictions and/or Violations:

Brady Bill Fee (misdemeanors only)	$ 5.00
Crime Stoppers Fee, only for charges after 7/15/98 (all misdemeanors and violations except KRS 196, 187, 188, 189 and 189A)	$ 1.00

P.A. Administration Fee as follows:

~~For appointments made prior to 7/15/98~~	~~$ 40.00~~
~~For appointments made after 7/15/98~~	~~$ 50.00~~
For Appointments made after 5-15-98	$ 50.00

Traumatic Brain Injury Fee as follows:

~~For all Speeding Violations (except State Traffic School)~~	~~$ 10.00~~
~~For **SELECT** Moving Violations (see schedule)~~	~~$ 10.00~~
~~For DUI's, including under 21 (except chapter 281A)~~	~~$ 20.00~~
~~Drug Testing Fee~~	~~$ 60.00~~

Pay the Crime Victim's Compensation Fund as follows:

~~For charges prior to 7/15/98 $ 10.00~~
For charges after 7/15/98 $ 20.00
~~Deputy Clerk Enhancement Fee (2% of restitution on orders of rest. made after 7/15/98) $~~
~~DUI Service Fee (Charges before 10/1/00) $200.00~~
~~DUI Service Fee (Charges after 10/1/00) $250.00~~
~~SCHIR Fee (for Speeding Convictions only) $ 12.50~~
~~SCHIR Fee (for violation of Child Restraint/ Seat Belt laws) $ 25.00~~

A five (5%) percent Deputy Clerk Enhancement Fee as applicable to the Items above.

9. That the supervision fee is set at **$500.00,** to be paid as follows: **$200.00** by the end of the first year; **$200.00** by the end of the second year and **$100.00** by the end of the third year, **with 5% Deputy Clerk Enhancement Fee to be paid with each payment.**

10. Report to the probation officer as directed and comply with all written rules, regulations or stipulations imposed by him and the Department of Corrections, Division of Probation and Parole.

11. Permit the probation officer to visit the Defendant at home or elsewhere.

12. Answer all reasonable inquiries by the probation officer and promptly notify the

probation officer of any change in address or employment.

13. Return to the Hardin Circuit Court only as directed.

14. No drugs or alcohol.

15. Submit to random alcohol and drug testing.

16. The Defendant is to enroll in, actively participate in, and successfully complete any substance abuse treatment and any counseling for his illegal behavior, the Division of Probation and Parole recommends.

IT IS FURTHER ORDERED that the 1995 Freightliner and Trailer, VIN #1FUYDZYB9SH706768, bearing the name Transamerica Freight Company owned by the Defendant, shall, pursuant to KRS 218A.405, et seq., be forfeited to the State and sold by the Hardin County Sheriff.

IT IS FURTHER ORDERED that the Defendant is hereby credited with time spent in custody prior to sentence, namely Three-hundred Sixty-five (365) days as credited by the jailer of Hardin County towards service of the maximum term of imprisonment, through the 17th day of September 2002.

Thereupon, the Court informed the Defendant of his right to an appeal to the Court of Appeals of Kentucky with the assistance of counsel, and of his right to a free appeal, including free

counsel and free transcript, if he could not afford same.

SO ORDERED this [4th] day of [October] 2002.

[Kelly Mark Easton]
JUDGE, HARDIN CIRCUIT COURT
DIVISION III

TENDERED BY:

[M. M. Ferguson]
COMMONWEALTH'S ATTORNEY'S OFFICE
9th Judicial Circuit

JOINT APPENDIX L

DEPARTMENT OF CORRECTIONS
ACKNOWLEDGEMENT/RELEASE
ROEDERER CORRECTIONAL COMPLEX
BOX 69
LAGRANGE, KENTUCKY 40031
PHONE: (502) 222-0170

Date 10/10/2002

I.N.S.
601 WEST BROADWAY
LOUISVILLE KY

Name: JOSE PADILLA # 159435-AC
Case#: A-xx-xxx-xxx
Charges: UNLAWFUL ENTRY INTO U.S.

Current Parole Eligibility Date: 12/2002
Current Minimum Expiration Date:
NOT AUDITED
*Subject to change based on good time loss or credits

Dear CLERK:

☒ We are lodging your DETAINER detainer/hold against the above captioned.

☐ We have received your ORDER FOR APPEARANCE which we are using as a hold.

If you wish to file a detainer, please forward appropriate documents.

☐ _____

For detainer/holds active when inmate becomes eligible for release, interested parties will be notified prior to the actual date of release in order for arrangements to be made to assume custody.

****

We are releasing your _____ detainer/hold since:

- ☐ Case(s) dismissed by the Court.
- ☐ Case(s) passed on to the Circuit Court, case number(s)_____.
- ☐ Charge(s) reduced to misdemeanor charge(s).
- ☐ Subject was sentenced on case(s).
- ☐ Our records indicate subject was released on own recognizance (ROR). If you wish to be notified upon subject's release from our custody, please forward your request in writing to this office.
- ☐ _____

We trust this disposition is satisfactory and assure you of our continued cooperation.

Sincerely

FRANK VASQUEZ
Offender Records Specialist
Central Office Inmate File
Institutional Inmate File
Inmate
CTO :K. WALLOVER

AN EQUAL OPPORTUNITY EMPLOYER M/F/D

JOINT APPENDIX M

HARDIN CIRCUIT COURT
COMMONWEALTH OF KENTUCKY
DIVISION III
NO: 01-CR-00517

JOSE PADILLA

VS. RCr.11.42 MOTION

COMMONWEALTH
OF KENTUCKY *RESPONDENT*

*** *** *** ***

Comes now, Jose Padilla, movant, Pro-Se, and moves this court to appoint counsel, grant a hearing, then to vacate and set aside his conviction pursuant to RCr.11.42; in support thereof:

HISTORY OF CASE

The movant was sentenced to a term of 10 years with 5 years of that term probated on the 17th day of September 2002, and the judgment entered on October 4, 2002. On October 10, 2002, the movant had an Immigration Detainer lodged against him. (see movant's Exhibit).

JURISDICTION

This motion is filed within the three years time limitation pursuant to RCr.11.42. The movant is being held due to ineffective assistance of counsel in violation of the 6th and 14th Amendments of the

United States Constitution, and RCr.11.42 is the proper remedy for relief.

ISSUE AND ARGUMENT

TRIAL COUNSEL FAILED TO PROPERLY INVESTIGATE MOVANT IMMIGRATION STATUS BEFORE ENTERING AN AGREEMENT IN VIOLATION OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The movant who is an honorably discharged vietnam veteran has never became a United States Citizen. His immigration status therefore was at issue in this case.

His defense counsel, Quinn Pearl, Jr., was obligated in his investigation to determine and inform the movant of all consequences of his plea.

In a to be published decision: Fuartado V. Com., KyApp., ____ S.W.3d ____ (decided November 21, 2003; Case No. 2002-CA-001729 MR). Held that trial counsel is required to investigation possible immigration consequences. Fuartado, Supra at 8 to 12 of the slip opinion.

Mr. Pearl comments were the movant did not have to worry about immigration status since he had been in the country so long. This statement was not true given 8 U.S.C. 1227 (a) (2) (a) (iii) and the current provision is found at 8 U.S.C. 1227 (a) (2) (B) (i).

Had the movant been properly advize advise by counsel general duty to investigate and be prepared

he would not have plead guilty but would have insisted on going to trial.

The action of counsel reaches the level of ineffectiveness by improperly advising the movant See: Taylor V. Com., Ky. App., 724 S.W.2d 223 (1986); and hill V. Lockhart, 474 U.S. 52 (1985); United States V. Santelises, 509 F.2d 703 (2nd Cir 1975).

The Kentucky Court of Appeal in Fuartado Supra at 10 held that the proper standard to apply (in these type of cases) is a case-by-case approach and that approach was explained by the Supreme Court of Colorado in People V. Pozo, 746 P.2d 523,529 (Colo. 1987).

The movant suffer unreasonable prejudice and consequences by the mistaken advise of counsel and his failure to properly investigate, and such action violates the 6th Amendment of the United States Constitution and the 14th Amendment. See: Quintero V. Bell, 256 F.3d 409 (6th Cir . 2001); Baker V. U.S., 781 F.2d 85 (6th Cir. 1986).

As a matter of law had counsel properly advised the movant, he would have gone to trial. See: Bronk V. Com., Ky., 58 S.W.3d 482 (2001); and Casey V. Com., Ky. App, 994 S.W.2d 18 (1999).

Wherefore, The movant, Jose Padilla, Pro-Se, moves this court to appoint him counsel, grant him a hearing, the to vacate and set aside his judment pursuant to RCr.11.42.

Respectfully Submitted

[X J Padilla]
Jose Padilla, #159435,
Northpoint Training Center
P.O. Box 479
Burgin, Kentucky 40310

VERIFICATION

I, Jose Padilla, being first duly sworn depose and say upon my oath:

1). I am the undersigned

2). I have filed the foregoing motion pursuant to RCr.11.42 and all facts and statements therein are true to the best of my knowledge and recollection.

3). Further Affiant sayeth not.

[X J Padilla]
Jose Padilla/Affiant

Subscribed and sworn to before me by Jose Padilla this [13th] day of August 2004.

[Robert Melby]
NOTARY PUBLIC

[06-03-07]
MY COMMISSION EXPIRES

JOINT APPENDIX N

COMMONWEALTH OF KENTUCKY
[Hardin] CIRCUIT COURT
CASE NO. [01 CR 517]

[Jose R. Padilla]

VS.

MOTION FOR
EVIDENTIARY
HEARING
AND FOR PERSONAL
APPEARANCE

COMWONWEALTH OF
KENTUCKY *RESPONDENT*

* *

THE MOVANT, [Jose R. Padilla], IN HIS OWN BEHALF, PRO SE, MOVES THIS COURT FOR THE ENTRY OF AN ORDER GRANTING A FULL EVIDENTIARY HEARING IN THIS MATTER AND TO PERMIT HIM TO BE PRESENT AT WHICH TIME THE COURT SO CONDUCTS SAID HEARING.

THIS COURT IS AUTHORIZED TO GRANT AND HOLD A HEARING IN THIS MATTER, PURSUANT TO COTES V. COMMONWEALTH, KY., 386 s.w.2d 465 (1965).

WHEREFORE, IN VIEW OF THE FOREGOING, MOVANT RESPECTFULLY REQUEST THAT HE BE ALLOWED TO PERSONALLY APPEAR AT

SAID HEARING AND WITHIN SUFFICIENT TIME TO CONSULT WITH COUNSEL.

RESPECTFULLY
SUBMITTED,

[X J Padilla]
NORTHPOINT TRAINING
CENTER
P.O. Box 479, Hwy. 33
BURGIN, KENTUCKY 40310

DATED ON THIS [13th] DAY OF [August] 20[04].

JOINT APPENDIX O

AFFIDAVIT

Comes the Affiant, Jose R. Padilla, and after first being duly sworn, states the following:

1. I am the defendant in *Commonwealth v. Jose Padilla*, Hardin Circuit Court, Indictment No: 01-CR-517. My case is currently on appeal in *Commonwealth v. Jose Padilla*, 2006-SC-321-DG.

2. I am a citizen of Honduras, who has been a legal permanent resident of the United States from the 1960's to the present. My INS identification number is Axxxxxxxx.

3. I am currently living with my family in La Puente, California. I am facing deportation because of my conviction in this matter. It is my understanding that if this conviction was vacated and I was ultimately not convicted of this offense, I would not be subject to deportation.

4. Upon my apprehension by Hardin County authorities, my immigration documentation was copied by the police. A copy of my immigration documentation was turned over to me in discovery.

5. Attached is a true and correct copy of my immigration documentation, attesting to my current status as a legal permanent resident of the United States.

AND FURTHER THE AFFIANT SAYETH NOT.

Signed,
[J Padilla]
Jose R. Padilla

IN THE STATE OF CALIFORNIA)
)
COUNTY OF [Los Angeles])

[DECEMBER]
Sworn and subscribed to before me on [~~November~~ 7, 2006] by Jose R. Padilla. [C.N.]

Signed,

[Chris Norega]
Notary Public

My commission expires: [June 26, 2009]

JOINT APPENDIX P

SUPREME COURT OF KENTUCKY
Case No: 2006-SC-321-DG

COMMONWEALTH OF KENTUCKY — *APPELLANT,*

VS. — *MOTION TO STRIKE "BRIEF FOR APPELLANT, COMMONWEALTH OF KENTUCKY"*

JOSE R. PADILLA — *APPELLEE.*

Comes the Appellee, Jose R. Padilla, through counsel, pursuant to CR 12.06, CR 76.12, and all other applicable law, and moves this court to strike the "Brief for Appellant, Commonwealth of Kentucky." As basis for this motion, the Appellee states the following:

1. Mr. Padilla is a legal permanent resident of the United States[1], who served honorably in the United States Army during the Vietnam conflict,[2] and prior to his arrest drove a semi-truck under a Commercial Drivers License (CDL) which was lawfully issued by the State of Nevada.[3] Mr. Padilla was pulled over in Hardin County, and

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[1] *See* Affidavit, attached at 5-1

[2] TR 59, attached at 3-2

[3] TR 9-10, attached at 4-1

arrested upon an allegation that he was trafficking in marijuana.

2. Mr. Padilla ultimately pled guilty to the charges, and was sentenced to ten years, five to serve, with five additional years probated. While in prison, Appellee filed a *pro se* motion under RCr 11.42, alleging that he was "an honorably discharged Vietnam veteran [who] has never become a United States Citizen." His allegation was that prior to taking the plea, his attorney had advised him that he "did not have to worry about immigration status since he had been in the country so long."[4] He alleged that he would not have taken the plea had he known that it would have led to deportation, and that deportation proceedings were currently pending against him. The Commonwealth did not respond.

3. The trial court denied Padilla's motion, without appointing counsel and without an evidentiary hearing, finding that:

> Padilla's counsel does not make a deportation decision, and neither does this Court. This record indicates that Padilla was aware of the possibility that he could be deported. Padilla cannot show ineffective assistance of counsel merely because of a statement of opinion on whether the Immigration and Naturalization Service would choose to

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[4] *See* RCr 11.42 Petition, attached, at pg. 3-2.

> deport Padilla given his length of time in the United States.[5]

Padilla appealed that decision to the Kentucky Court of Appeals.

4. Ultimately, the Court of Appeals granted limited relief to Mr. Padilla, finding that if he could prove that his attorney did advise him that his plea had no immigration consequences (as opposed to merely saying "I don't know"), that the plea did indeed have consequences as far as immigration is concerned, and that he would not have taken the plea had the attorney not assured him that there were no consequences, he would indeed be entitled to relief.[6] As none of those claims was refuted by the record, the Court of Appeals found that Mr. Padilla was entitled to an evidentiary hearing.[7]

5. The Commonwealth sought discretionary review by this court, to resolve the following issue: "Does the 6th Amendment Guarantee against attorney misadvice concerning potential consequences collateral to a guilty plea." On August 17, 2006, this court granted the Commonwealth's motion. On November 15, 2006, the Commonwealth filed the "Brief for Appellant, Commonwealth of Kentucky" (hereinafter "BC").

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[5] Attached, 2-3 to 2-4

[6] *See* Slip Op., attached at 1-1 to 1-8.

[7] *Id.*, pp. 1-7 to 1-8

6. At no time in the proceedings leading to this point has the Commonwealth disputed Mr. Padilla's right to be in this country prior to his arrest.[8] However, in its brief to this court, the Commonwealth alleges for the first time that Padilla is actually an illegal alien. In the introduction, the Commonwealth states that "Padilla, ***an illegal alien***, successfully plea bargained for five years to serve and five years probation on drag trafficking and related changes" (BC, pg. i)(emphasis added). Later, in the argument section of the brief, the Commonwealth states that "***An illegal alien***, Padilla contends that his guilty plea to drug trafficking crimes is invalid by reason of counsel ineffectiveness" (BC, pg. 3)(emphasis added). In concluding its argument, the Commonwealth argues that "Padilla is especially ill suited to complain here. ***As an illegal alien, he is subject to deportation anyway***" (BC, pg. 5)(emphasis added). The Commonwealth goes on state that "[t]he record does not reflect, and Padilla's counsel has not said, whether Padilla has been deported or is facing deportation" (*Id.*).[9]

7. Generally, this court has the power to strike a brief if it does not conform to any substantial requirement of CR 76.12. CR 76.12(8)(a). Moreover, under CR 12.06, this court may order striken "any

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[8] There was no response filed in the trial court. Relevant portions of the Commonwealth's Brief in the Court of Appeals are attached at 6-1 to 6-6.

[9] In answer to the Commonwealth's insinuation that this case is moot, Mr. Padilla remains in the country, and is facing deportation. *See* Affidavit of Jose Padilla, attached, 5-1.

insufficient defense or any sham, redundant, immaterial, impertinent, or scandalous matter." In this case, the Commonwealth's assertions that Padilla is an illegal alien – which the Commonwealth did not mention in its brief to the Court of Appeals, or in its motion for discretionary review – are certainly "immaterial" and "impertinent" to the issue on which this court has accepted review. This Court did not accept discretionary review of this matter to determine whether an illegal immigrant to vacate his plea. Rather, it granted review to determine whether a person can vacate their plea on an ineffectiveness claim when they plea to an offense which results in mandatory deportation after their attorney advises them that would not be deportable. To adapt this position for the first time today, in the absence of any record to support it, and without affording Mr. Padilla a chance to respond, is "scandalous."

8. Moreover, this court has the authority to strike a brief if it does not comply with the CR 76.12. CR 76.12(4)(c)(v) provides that the argument to a brief should include "ample supportive references to the record." However, at no point does the Commonwealth include a citation to the record to support its newfound claim that Padilla is an illegal alien. The absence of citation belies the fact that the assertion is simply unsupportable. There has been no evidentiary hearing in this case where Mr. Padilla's immigration status has been litigated, so Mr. Padilla has never been given any opportunity to offer evidence about his immigration status. Mr. Padilla filed this pleading *pro se*, and undoubtedly assumed that his legal status in this country was implicit to

the fact that he was an honorably discharged Vietnam veteran.

9. In addition to Mr. Padilla's unrefuted allegation that he is an honorably discharged veteran of the United States military, the record also contains a record a report on his commercial drivers license, showing that at the time of his arrest, he possessed a valid commercial drivers license issued by the State of Nevada. In general, such a license cannot be issued to a person who is not a legal resident of the State of Nevada. *See* Nev.Rev.St. 483.250(7); Nev.Rev.St. 483.141(1). Moreover, Padilla's social security number is listed on the printout, xxx-xx-****.[10] *See* 42 U.S.C.A. 405(c)(2)(b)(III) (prohibiting the Commissioner of Social Security from issuing a number to a person who is, "because of his alien status, prohibited from engaging in employment.")

10. The only mention of Mr. Padilla's status by the trial court is in the order denying Mr. Padilla's RCr 11.42 motion. There, the court noted that "By an order [of the district court] entered on September 19, 2001, Padilla's bond was changed because he 'is believed to be an illegal alien who is awaiting deportation by the Federal authorities.'[11] Thus, it appears that from the very beginning of this case Padilla would have been aware of the possibility of deportation." In its brief, the Commonwealth asserts

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[10] The full number has been redacted from this pleading for identity protection purposes.

[11] Bond was reinstated when Padilla was indicted, and the issue of whether Padilla was an illegal immigrant was not raised to the circuit court.

that "apparently deportation proceedings against Padilla already were underway long before he pleaded guilty" (BC, pg. 5), apparently referencing that statement. Of course, that is not what the court said, and the court's order contains no reference to deportation proceedings being "underway long before he pleaded guilty". Rather, the court's finding was limited to the fact that Padilla was likely to have been aware of the fact that he was known to the INS, and that any conviction may carry consequences up to and including deportation.[12] There is no court finding in the record at any level that Padilla is, in fact, an illegal alien.[13]

11. As noted, Padilla himself has never been given the opportunity to offer proof on the subject. Lest there be any doubt about Padilla's status, attached is his affidavit attesting to his status, along with a copy of his resident alien card.[14] This information would have been easily obtained by the

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[12] The trial court's finding in this regard is somewhat inapposite. Padilla's claim is that he was concerned about the immigration consequences of his plea, and was only induced to plea by his attorneys representation that there would be no consequences.

[13] The only basis on which one could have assumed that Padilla was in fact an illegal alien was the charge listed on the form prepared by the Roederer Correctional Complex acknowledging the detainer, which listed Padilla's charges as "illegal entry into US." *See* 3-5, attached. However, the detainer request itself does not list a charge as the basis for the detainer, merely that Padilla was "under investigation." *See* 3-6. Consequently, the statement appears to be merely an incorrect assumption on the part of an employee of the Department of Corrections.

[14] Attached at 5-1 to 5-3.

Commonwealth prior to filing its brief. Not only was Mr. Padilla's resident alien card copied by the police and retained in the Commonwealth Attorney's file, Mr. Padilla resident alien number – Axxxxx***[15] – is also the case number on the detainer issued by the INS, which was attached to Mr. Padilla's RCr 11.42 and contained in the appellate record.

12. In short, it was well within the Commonwealth's power to determine whether Mr. Padilla was or was not illegal, prior to asserting it in their brief. The Commonwealth has a duty to learn of information in the possession of any of its agents which might be favorable to the defendant. *Kyles v. Whitley*, 514 U.S. 4.19, 115 S.Ct. 1555 (1995). The Commonwealth has a duty not to assert as fact things it knows or ought to know to be untrue. To that end, this court has long known that:

> [i]t especially is incumbent upon the attorney representing the Commonwealth to fully represent the evidence in its true light; because any statement uttered by him in a criminal case is more or less strengthened by his official position, since all men know it is his duty not only to endeavor to convict the guilty, but likewise to effect the acquittal of the innocent.

Edwards v. Commonwealth, 182 S.W.2d 948, 952 (Ky. 1944). Or, as the United States Supreme Court has

---

[15] The remainder of the number is redacted to protect Mr. Padilla's identity.

put it: "while [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 633, 79 L.Ed, 1314 (1935). By its own account, the Commonwealth has failed to acquaint itself with Mr. Padilla's status, and consequently it has made assertions of fact which are simply untrue.

13. The Commonwealth made the assertion because it very clearly changes the complexion of the case. If Mr. Padilla was an illegal immigrant – and therefore was subject to deportation regardless of whether he was convicted or acquitted of this offense – he would have very little basis to claim that his plea was affected by his attorney's misadvice. On the other hand, if he is a legal permanent resident, whose plea to an "aggravated felony" will result in mandatory deportation, his attorney's misadvice would be very significant.

14. Factually, this case presents the latter situation. Padilla's allegation is that he pled to a trafficking charge after being assured that he would not be deported as a result of the plea. However, a plea in state court to a trafficking charge is an "aggravated felony" under immigration law. *Lopez v. Gonzales*, ___ U.S. ___, ___ S. Ct. ___, 2006 WL 3487031 (2006). A plea to an "aggravated felony" will result in mandatory deportation. *See* 8 U.S.C.A. § 1227(a)(2)(A)(iii) (requiring deportation, for a person convicted of an aggravated felony); 8 U.S.C.A. § 1229b(a)(3) (prohibiting the Attorney General from canceling the deportation of a person who is convicted of an aggravated felony); 8 U.S.C.A. §§ 1158(b)(2)(A)(ii) and (B)(i) (barring a person convicted of an aggravated felony from seeking

asylum). Given that deportation is a such direct result of the plea, it is easy to see why the Commonwealth would prefer this Court to believe that Mr. Padilla was an illegal immigrant whose plea was essentially irrelevant to his immigration status.

15. This case has extraordinarily significant consequences for Mr. Padilla. This court's ruling will go a long way to deciding whether he has to leave his family and a country he has known and served for nearly 40 years, or whether he might be able to remain in this country and perhaps someday obtain citizenship. In defending this action, Padilla should not have to disprove unsupported allegations by the Commonwealth. Accordingly, this court should order the brief striken, and order a the Commonwealth to prepare and file a new brief with appropriate citations to the record, and which does not rely upon unsupported factual claims.

WHEREFORE, for the foregoing reasons, the Appellee requests that the court order the "Brief for Appellant, Commonwealth of Kentucky" to be stricken from the record.

Respectfully Submitted,

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Notice

Please take notice that the foregoing motion has been filed in the Kentucky Supreme Court on December 8, 2006.

Certificate of Service

I certify that on December 8, 2006 a true and correct copy of the foregoing document was served by mail upon Hon. David Smith, Assistant Attorney General, 1024 Capital Center Drive, 3rd Floor, Frankfort, KY 40601.

[Timothy G. Arnold]

JOINT APPENDIX Q

SUPREME COURT OF KENTUCKY
Case No: 2006-SC-321-DG

COMMONWEALTH OF KENTUCKY — *APPELLANT,*

VS.

REPLY BRIEF FOR APPELLANT COMMONWEALTH OF KENTUCKY

JOSE R. PADILLA — *APPELLEE.*

INTRODUCTION

This brief is a reply to assertions made in Padilla's appellee brief.

POINTS

The Commonwealth makes three (3) points in reply:

1. **One cannot convert a non-cognizable claim into a cognizable claim simply by blaming his lawyer.** "As counsel owed no duty to the defendant to investigate [deportation] consequences, his failure to conduct that investigation could not be regarded as ineffective assistance of counsel." (Padilla's brief, p. 10, citing Commonwealth v. Fuartado, 170 S.W.3d 384 (Ky. 2005).

Padilla suggests on the following page, though, that defense counsel "affirmatively bamboozle[d]" him by 'volunteering incorrect advice."

Since a guilty plea is valid despite the defendant's misunderstanding about a collateral consequence, the source of that misunderstanding does not matter. If the misunderstanding is irrelevant, as indeed it is, then the cause of the misunderstanding likewise is irrelevant.

2. **Padilla's IAC claim does not turn on whether he is a guest of this country or an intruder into it.** Padilla dislikes the record's references to him as an illegal alien. He has filed a motion to strike the Commonwealth's main brief for having cited to the record on that score. The Commonwealth's response to the motion to strike observed that the record in this respect is undisputed. By February 12, 2007 order, his Court passed the motion to the merits.

Padilla's brief resumes his motion to strike. He uses quicksilver wording which, upon dissection, indicates that he remained here illegally as opposed to entering here illegally. Padilla's distinction between entering illegally and remaining illegally makes no difference and it brings to mind the language in the burglary statute. Padilla's minimization of his alien status is akin to his protest that the illegal drugs he was smuggling at the time of his capture weighed only half a ton.

Contrary to the suggestions made in Padilla's brief, the ruling in this case does not turn on whether he was a legal alien or an illegal alien at the time of

his arrest. A constitutionally valid guilty plea stands alone. Attorney misadvice about a collateral consequence made to a natural U.S. citizen does not invalidate such a plea. Neither does attorney misadvice about the collateral consequence of deportation made to an alien invalidate his guilty plea.

3. **Padilla still has not divulged whether he has been deported or is facing deportation.** The last sentence of the Commonwealth's main brief noted that Padilla has never indicated whether he has been deported or is facing deportation. Padilla's brief clamors about the harshness of potential "banishment" but avoids telling this Court whether he has been deported or is facing deportation.

A counsel ineffectiveness claim requires actual prejudice, not just the risk of prejudice. From Padilla's evasion of the deportation question it must be assumed that no prejudice has occurred.

Padilla's IAC claim fails both the performance prong **(Point # 1)** and the prejudice prong **(Point # 3)** of the test. Under this Court's unanimous decision in Fuartado, 170 S.W.3d at 386, an IAC claim about deportation consequences of a guilty plea conviction is not cognizable in the first place:

> Because the consideration of collateral consequences is outside the scope of representation required under the Sixth Amendment, failure of defense counsel to advise Appellee of potential deportation consequences was not

cognizable as a claim for ineffective assistance of counsel.

WHEREFORE, the opinion of the Court of Appeals should be reversed and the judgment of the Circuit Court should be reinstated in all respects.

Respectfully Submitted,

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PETITIONER'S BRIEF

B882
Supreme Court, U.S.
FILED
MAY 26 2009
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129

No. 08-651 (5)

IN THE

Supreme Court of the United States

JOSE PADILLA,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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QUESTIONS PRESENTED

1. In providing the effective assistance guaranteed by the Sixth Amendment, does defense counsel never have a duty to investigate and advise a non-citizen client whether the offense to which he is pleading guilty will result in his deportation?

2. If a criminal defense attorney falsely advises a non-citizen client that his plea of guilty will not result in deportation, can that misadvice constitute ineffective assistance of counsel under the Sixth Amendment?

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No. 08-651

IN THE
Supreme Court of the United States

JOSE PADILLA,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF OF PETITIONER

OPINIONS BELOW

The Kentucky Supreme Court's opinion is reported at 253 S.W.3d 482 (Ky. 2008) and is reprinted in the Petition Appendix (Pet. App.) 19-27. The Kentucky Supreme Court's order denying rehearing was not reported and is reproduced at Pet. App. 28. The opinion of the Kentucky Court of Appeals was designated to be published but was not. It is reproduced at Pet. App. 29-40. The Hardin County Circuit Court's order denying Petitioner's motion for post-conviction relief was not reported and is reproduced at Pet. App. 41-44.

JURISDICTION

The Kentucky Supreme Court entered final judgment on January 24, 2008 and denied a petition for rehearing on June 19, 2008. On September 16, 2008, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including November 16, 2008. Petitioner timely filed the petition for writ of certiorari on November 14, 2008, which this Court granted on February 23, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS

The relevant statutory and regulatory provisions are set forth in an appendix to this brief.

STATEMENT OF THE CASE

When defense counsel represents an immigrant in a criminal prosecution, "'[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.'" *INS v. St. Cyr*, 533 U.S. 289, 322 (2001) (quoting 3 Bender, *Criminal Defense Techniques* §§ 60A.01, 60A.02[2] (1999)). Petitioner Jose Padilla, a longtime lawful permanent resident of the United States and U.S. Army veteran, pleaded guilty in 2002 to a state felony offense for marijuana drug trafficking. Padilla did so on the advice of defense counsel that he did not need to worry about deportation because he had been in this country for so long. In fact, the Kentucky drug trafficking offense is an "aggravated felony" under federal law

that effectively subjects Padilla to mandatory deportation. The Kentucky Supreme Court nonetheless denied Padilla's motion to vacate his plea on the grounds of ineffective assistance of counsel. Pet. App. 23. The Kentucky court held that advice on the "collateral consequence" of deportation is outside the scope of the Sixth Amendment guarantee, and that neither failure to advise nor even affirmative misadvice about such consequences can give rise to a claim of ineffective assistance of counsel. *See id.* The Kentucky rule has no basis in precedent or logic, and this Court should reject it.

A. Immigration Law Background

Because of recent amendments to the Immigration and Nationality Act, a great number of criminal convictions now lead to the dire and inevitable consequence of deportation. Criminal convictions have long been a basis for deportation of immigrants. *See St. Cyr*, 533 U.S. at 294-97. By 1988, deportable crimes included convictions of "a crime involving moral turpitude committed within five years after entry" and a sentence of imprisonment or actual imprisonment for at least one year; convictions related to controlled substances; and convictions of aggravated felonies. 8 U.S.C. § 1251(a)(4), (11) (1988).[1] At the time, aggravated felonies encompassed only crimes of murder, drug trafficking, and arms trafficking. *Id.*

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[1] Unless otherwise noted, references to federal and state statutes and regulations are to the provisions in effect in 2002, the year of Petitioner's conviction.

In earlier decades, deportation was not an inevitable consequence of conviction because of widely available mechanisms of judicial and administrative relief. From the inception of the Immigration and Nationality Act of 1917 until 1990, courts had the power to issue a Judicial Recommendation Against Deportation ("JRAD"), 8 U.S.C. § 1251(b) (1988), in order "to make the total penalty for the crime less harsh and less severe when deportation would appear to be unjust." *Janvier v. United States*, 793 F.2d 449, 453 (2d Cir. 1986) (citing 53 Cong. Rec. 5169-74 (1916)). A JRAD was binding upon the Attorney General and conclusively determined that a particular conviction could not serve as the basis for deportation. *Id.* at 452. Indeed, a JRAD was so essential to avoiding the collateral consequence of deportation that courts found failure to request a JRAD for a defendant facing deportation to be ineffective assistance of counsel under the Sixth Amendment. *See, e.g., United States v. Castro*, 26 F.3d 557, 563 (5th Cir. 1994); *Janvier*, 793 F.2d at 456.

Immigration officials also had ample power to relieve immigrants of the deportation consequences of their convictions. For example, until the 1990s, the Attorney General had "broad discretion" under Section 212(c) of the Immigration and Nationality Act to issue a waiver of deportation. *St. Cyr*, 533 U.S. at 294-95. "Factors meriting favorable exercise of administrative discretion included family ties in the United States, hardship, and length of residence in the United States, even where adverse factors in an application were present." Lea McDermid, *Deportation is Different: Noncitizens and Ineffective*

Assistance of Counsel, 89 Cal. L. Rev. 741, 759 (2001). The Attorney General granted relief in more than half the cases in which waiver was sought. *Id.* at 759-60. Between 1989 and 1995, more than 10,000 aliens received relief under this provision. *St. Cyr*, 533 U.S. at 295-96.

Beginning in 1990, the entire landscape changed. The Immigration and Nationality Act of 1990 eliminated the JRAD procedure, both prospectively and retroactively. *See* 8 U.S.C. § 1251(b) (1988), *repealed by* Immigration Act of 1990, Pub. L. No. 101- 649, § 505, 104 Stat. 4978, 5050. In the 1990 Act, Congress designated substantially more crimes as aggravated felonies, *see id.* § 501, and limited the forms of legal relief available to them. It barred aggravated felons from proving "good moral character," thus making them ineligible for various immigration benefits. *Id.* §§ 509, 515(a) (codified as amended at 8 U.S.C. §§ 1101(a)(43), 1101(f)(8), 1158, 1229(b)-(c), 1259(c), 1427(d)). It also barred immigrants from waiver of deportation if they had served five or more years in prison for an aggravated felony. *See id.* § 511(a), 104 Stat. 5072; *Matter of Ramirez-Somera*, 20 I. & N. Dec. 564, 564-65 (BIA 1992).

Six years later, the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA) stiffened the immigration laws for aggravated felonies even further. Congress prospectively eliminated Section 212(c) relief, although it is still retroactively available in some cases. *See* AEDPA, Pub. L. No. 104-132, § 440(d), 110 Stat. 1214, 1276-77 (codified as amended at 8 U.S.C.

§ 1105a(a)(10)); IIRIRA, Pub. L. No. 104-208, § 304(b) (1996); *see also St. Cyr*, 533 U.S. at 297. In its stead, Congress gave the Attorney General the authority to "cancel" removal for a defined class of deportable immigrants. *See* IIRIRA, § 304(a)(3) (codified at 8 U.S.C. § 1229b(a)) (cancellation of removal for permanent residents). Congress made individuals convicted of aggravated felonies ineligible for the cancellation remedy. IIRIRA § 304(a)(3) (codified as amended at 8 U.S.C. § 1229b(a)-(c)); Dan Kesselbrenner & Lory D. Rosenberg, *Immigration Law and Crimes* § 10:23 (2008).

The 1996 laws further expanded the range of offenses that qualify as aggravated felonies. McDermid, *supra*, at 744. As a result, aggravated felonies now encompass a wide array of nonviolent offenses for which the sentence imposed is a term of imprisonment of at least one year (regardless of time served or suspension of sentence). Those offenses include such crimes as passport or document fraud, obstruction of justice, forgery, perjury, commercial bribery, and trafficking in vehicles with altered identification numbers. *See, e.g.*, 8 U.S.C. § 1101(a)(43)(P), (R), (S); Kesselbrenner & Rosenberg, *supra*, at § 7:37. Accordingly, courts have held that even state misdemeanor offenses may qualify as aggravated felonies for purposes of federal immigration law, regardless of whether the defendant served a term of imprisonment. *See, e.g.*, *United States v. Graham*, 169 F.3d 787, 788-91 (3d Cir. 1999) (holding that petty theft with a one-year suspended sentence is an aggravated felony for immigration purposes). Indeed, many offenses, such as drug trafficking (the offense at issue here), are

aggravated felonies regardless of the sentence imposed. *See* 8 U.S.C. § 1101(a)(43)(B); *Lopez v. Gonzales*, 549 U.S. 47, 60 (2006); *see also, e.g.*, 8 U.S.C. § 1101(a)(43)(M)(i), (ii) (2009) (tax evasion or fraud in which the loss exceeds $10,000).

Thus, once removal proceedings are commenced, immigrants have virtually no defense if their convictions fall into the capacious category of "aggravated felonies." Criminal defense counsel are the last line of defense. Counsel who are aware of immigration consequences achieve significant victories for their clients in the criminal prosecution by crafting trial and plea bargaining strategies to avoid conviction of offenses that may be classified as aggravated felonies. Often, the target disposition is simple: for example, counsel may obtain agreements to plead guilty to a different count in the indictment that is either not deportable or does not disqualify the defendant from eligibility for cancellation for removal. *See* Norton Tooby & Joseph Rollin, *Safe Havens: How to Identify and Construct Non-Deportable Convictions* (2005) ("Tooby on Safe Havens") (collecting decisions ruling certain offenses not to be aggravated felonies or not deportable, and advising on the creation of safe havens from deportation in sentencing). Furthermore, counsel may achieve sentences below the level that cause certain offenses to be classified as aggravated felonies (for example, a 364-day sentence rather than a 365-day sentence). *See, e.g.*, *State v. Quintero-Morelos*, 137 P.3d 114, 119 (Wash. Ct. App. 2006); Norton Tooby & Joseph Rollin, *Criminal Defense of Immigrants* § 10.1 (4th Ed. 2007) ("Tooby on Criminal Defense"). Finally, if all else fails, counsel may take a

case to trial if the client makes the calculated decision to do so considering all the circumstances, including the threat of deportation.

B. Petitioner's Conviction

Petitioner Jose Padilla, born in Honduras in 1950, is a lawful permanent resident of the United States. J.A. 44, 77. He arrived in the United States from Honduras in the 1960s, and later served honorably in the U.S. military in the Vietnam War. J.A. 77; Pet. App. 19. He lives with his family in California. J.A. 77.

In September 2001, Padilla, a licensed commercial truck driver, was arrested in Kentucky for transporting marijuana. J.A. 1-2. In October 2001, he was indicted in Hardin County Circuit Court for misdemeanor possession of marijuana, misdemeanor possession of drug paraphernalia, felony trafficking in marijuana, and failing to have a weight and distance tax number on his truck. J.A. 47-49.

Padilla initially pleaded not guilty, and was released on bond. J.A. 8-9. The Immigration and Naturalization Service soon thereafter lodged an immigration detainer instructing the custodian to retain him 48 hours because "investigation has been initiated to determine whether this person is subject to removal from the United States" for unlawful entry. J.A. 44-46. The Hardin District Court misinterpreted this standard notice of investigation to suggest that Padilla "is believed to be an illegal alien" and revoked bail on September 19, 2001. J.A. 43. His counsel never raised with the District Court

that Padilla was a lawful permanent resident of the United States, and Padilla remained unnecessarily in custody prior to conviction for almost a year.

Padilla pleaded guilty to the misdemeanor drug and paraphernalia possession counts and the felony marijuana trafficking count; the fourth count was dismissed. J.A. 57-58. The marijuana trafficking statute to which Padilla pleaded guilty provides that "a person is guilty of trafficking in marijuana when he knowingly and unlawfully traffics in marijuana." Ky. Rev. Stat. Ann. § 218A.1421(1). A first offense of trafficking in five pounds or more of marijuana is a Class C felony, which is punishable by a term of imprisonment of five to ten years. Ky. Rev. Stat. Ann. §§ 218A.1421(4)(a), 532.060(2)(c).

The plea agreement recommended a sentence to the maximum term of imprisonment on each count, to run concurrently for a total of 10 years, with five years served and five probated. J.A. 58-59.[2] Padilla also agreed to forfeit his truck and trailer. *Id.* On October 4, 2002, the court entered judgment convicting Padilla of those counts and imposing the agreed-upon sentence. J.A. 61-68. The court gave

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[2] A ten-year concurrent sentence is the maximum sentence that could have been imposed by law. Ky. Rev. Stat. Ann. § 532.110(1)(a) (2002) (sentences for a misdemeanor (referred to as a "definite term") must run concurrently with sentences for felonies (referred to as an "indeterminate term"), and both sentences are satisfied by service of the felony sentence).

Padilla credit for 365 days time served toward his sentence. J.A. 67.[3]

Padilla accepted the plea bargain in reliance on advice by his attorney that he did not have to worry about his immigration status as a result of the plea. *Cf. Fraser v. Commonwealth*, 59 S.W.3d 448, 452-53 (2001) (allegations of post-conviction petition are taken as true unless conclusively refuted by the record). The plea bargain provided only meager benefit to Padilla. Had Padilla gone to trial, he would not only have forced the Commonwealth to its proof of guilt by a reasonable doubt, but he also would have been entitled to request jury sentencing (and to present mitigating sentencing evidence). Ky. Rev. Stat. Ann. § 532.055(2). He may have received a substantially lower sentence than ten years, perhaps the minimum of five years. In any event, he would have been parole eligible after serving 20% of his sentence. 501 Ky. Admin. Regs. 1:030. Thus, even if he had gone to trial and received the maximum sentence of ten years, he would have been eligible for parole within approximately a year from conviction (given his credit of 365 days for time served). Padilla nonetheless chose to accept the certainty of a five year term of imprisonment with five years probated.

Padilla was misadvised by his attorney on the deportation consequences of his plea. J.A. 72.

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[3] Padilla's *pro se* petition indicated that six days after judgment, "the movant had an Immigration Detainer lodged against him." J.A. 71. It appears that the correctional facility notified the INS on that date that it had lodged the 2001 detainer, not that the INS issued a second detainer. *See* J.A. 69-70.

Padilla's felony drug conviction was a deportable crime, and indeed an aggravated felony. 8 U.S.C. § 1101(a)(43)(B); 8 U.S.C. § 1227(a)(2)(A)(iii) & (B)(i). Padilla's counsel had failed to investigate the immigration consequences associated with the proposed plea, and yet nonetheless affirmatively advised his client that he "did not have to worry about immigration status since he had been in the country so long." J.A. 72; Pet. App. 3. Had Padilla known the true consequences of his plea, he would not have pleaded guilty and would have insisted on going to trial. J.A. 72-73.

C. Post-Conviction Proceedings

On August 18, 2004, Padilla filed a *pro se* motion for post-conviction relief in the Hardin County Circuit Court alleging ineffective assistance of counsel. J.A. 71-74. As noted above, Padilla alleged that counsel was required to investigate possible immigration consequences, and that counsel's wrongful advice on the deportation consequences of his plea without investigation constituted ineffective assistance. J.A. 72. Padilla further alleged that he suffered prejudice as a result of the mistaken advice and failure to investigate, and that he would have gone to trial if properly advised. J.A. 72-73.

Under Kentucky law, a petitioner for post-conviction relief is entitled to an evidentiary hearing if the petition "on its face states grounds that are not conclusively refuted by the record and that, if true, would invalidate the conviction." *Baze v. Commonwealth*, 23 S.W.3d 619, 622 (Ky. 2000); Ky. R. Crim. P. 11.42. The Circuit Court *sua sponte* denied Padilla's motion, without awaiting the State's

answer and without an evidentiary hearing. The Circuit Court ruled that advice on collateral deportation consequences cannot give rise to a Sixth Amendment claim. Pet. App. 43-44. The Circuit Court also found that Padilla was aware of the possibility of deportation because of the 2001 immigration detainer (even though that detainer noticed an investigation of the lawfulness of his entry, [4] and did not concern the deportation consequences of conviction). Pet. App. 44.

On appeal, the Kentucky Court of Appeals reversed. It concluded that under *Commonwealth v. Fuartado*, 170 S.W.3d 384 (Ky. 2005), a defendant cannot bring an ineffective-assistance claim based on counsel's failure to investigate (or advise the defendant regarding) the immigration consequences of his plea. Pet. App. 32-34. However, relying on *Sparks v. Sowders*, 852 F.2d 882 (6th Cir. 1988), the Court of Appeals held that Padilla had stated a claim with respect to his allegation that counsel affirmatively misadvised him: "We are persuaded that counsel's wrong advice regarding deportation *could* constitute ineffective assistance of counsel pursuant to *Sparks* . . . ." Pet. App. 36 (emphasis added). The Kentucky Court of Appeals held "[t]he record does not refute [Padilla's] allegation that counsel had affirmatively assured him he would not be deported as a result of pleading guilty; nor does it refute his claim that but for counsel's mistaken advice, he would not have pled guilty." Pet. App. 36.

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[4] The reason for the INS's investigation of Padilla's entry status is unclear, since he is a lawful permanent resident. J.A. 77-78.

Finding that there were "relevant and substantial issues of fact" to be resolved, the Court of Appeals remanded for an evidentiary hearing. Pet. App. 36.

A divided Kentucky Supreme Court reversed. Pet. App. 19. The court held that counsel's failure to investigate immigration consequences, in and of itself, could not support an ineffective-assistance claim. Pet. App. 23. The court then went further, concluding that even affirmative misadvice on the subject of immigration consequences was not cognizable under the Sixth Amendment. Pet. App. 23. While recognizing that many courts have drawn a distinction between a lawyer's failure to advise and the rendering of incorrect advice, the court refused to do so: "As collateral consequences are outside the scope of the guarantee of the Sixth Amendment right to counsel, it follows that counsel's failure to advise [Padilla] of such collateral issue or his act of advising [Padilla] incorrectly provides no basis for relief." Pet. App. 23. Because "[i]n neither instance is the matter required to be addressed by counsel," the Kentucky court held that "an attorney's failure in that regard cannot constitute ineffectiveness entitling a criminal defendant to relief under *Strickland v. Washington* [466 U.S. 668 (1984)]." Pet. App. 23. Because the collateral-consequences rule foreclosed relief without need of an answer by the Commonwealth or an evidentiary hearing, the Kentucky Supreme Court did not address the question of whether it could be conclusively determined from the record whether Padilla's attorney's performance was objectively unreasonable or prejudicial.

Two Justices dissented, declaring, "Counsel who gives erroneous advice to a client which

influences a felony conviction is worse than no lawyer at all. Common sense dictates that such deficient lawyering goes to effectiveness." Pet. App. 26 (Cunningham, J., dissenting). The dissenting Justices agreed with the court of appeals that Padilla was entitled to a hearing. Pet. App. 26.

SUMMARY OF THE ARGUMENT

The Kentucky Supreme Court's collateral-consequences rule has no foundation in the Sixth Amendment and contravenes this Court's precedents. In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court held that Sixth Amendment claims of ineffective assistance of counsel are determined under a two-pronged test requiring [1] a showing that counsel's performance fell below an objective standard of reasonableness and [2] prejudice to the defendant. And in *Hill v. Lockhart*, 474 U.S. 52 (1985), this Court declined to import the collateral-consequences doctrine, which governs a court's duty to advise the defendant before accepting a guilty plea, into the Sixth Amendment. It held instead that an ineffective-assistance claim based on counsel's misadvice regarding the collateral consequence of parole eligibility must be resolved under *Strickland*. *Hill* compels rejection of the rule below.

Even if *Hill* did not foreclose invocation of the collateral-consequences rule, that rule conflicts with the Sixth Amendment. First, the collateral-consequences doctrine arose to define the duties of *a court* with regard to accepting guilty pleas under Fed. R. Crim. P. 11. It is not germane to the different and much broader duties of *defense counsel* in defending a criminal prosecution. Courts are passive and neutral.

They conduct no investigation into the prosecution's case or available defenses. Most critically, unlike courts, defense counsel have a paramount Sixth Amendment duty to protect the interests of the client that are at risk in the prosecution. Clients are not concerned solely with the direct penal consequences of conviction. They seek protection from the most significant harms of conviction, regardless of the source. For many immigrant defendants, the deportation consequences of conviction will matter much more than the criminal punishment. Indeed, when charges that fit the immigration classification of aggravated felonies hang in the balance, the criminal prosecution is effectively the defendant's only opportunity to prevent deportation. Competent representation in the criminal prosecution may require that counsel advise the client of the deportation risks of a proposed plea. Competent counsel may also need to shape defense strategy to avoid deportation by bargaining for pleas to nondeportable crimes, by advocating for sentences that will not trigger deportation, or by avoiding a plea and taking a case to trial.

Not only is the collateral-consequences rule a mismatch for the Sixth Amendment, but *Strickland* expressly rejects such mechanical definitions of an attorney's duties in a criminal representation. Instead, *Strickland* commands a contextual determination of the "reasonableness" of an attorney's performance under prevailing professional norms, such as ABA Model Rules and standards. The Kentucky Supreme Court's conception of a truncated duty of counsel that excludes investigation and advice regarding even dire collateral consequences of

conviction is contrary to the most basic ethical rules of the profession. For defense counsel, like any attorney, the client defines the objectives of the representation. Counsel must give the client informed advice about his legal rights, obligations, and risks, and must consult with the client regarding how to pursue his objectives. Counsel cannot limit the scope of the representation without the client's informed consent and without ensuring that the representation will remain competent if it is limited. The duty of competent representation does not permit counsel to remain oblivious of law with which counsel is unfamiliar. Counsel must either acquire the knowledge required by the representation or associate with an attorney competent in the field. Defense counsel cannot simply wash his hands of protecting his client from the most devastating consequences of conviction.

Kentucky's rule also flies in the face of specific professional standards of the American Bar Association and public defenders' organizations requiring criminal defense counsel to investigate and advise clients about the collateral consequences of conviction (especially deportation). This Court should not erode *Strickland*, or countenance wooden rules that leave defendants with no relief even if their pleas of guilty are prejudiced by the stark incompetency of their counsel. In all events, the dichotomy between "direct" and "collateral" consequences is a false one. Because prosecutors take collateral consequences into account in charging decisions, and because judges consider them in sentencing, defense counsel generally must investigate *collateral* consequences in order to reduce

the *direct* penal consequences of conviction. Investigation of collateral consequences is essential to performing counsel's unquestioned function of bargaining for pleas to lesser counts and advocating for reduced sentences.

Alternatively, even if this Court does not wish to decide the fate of the collateral-consequences rule generally, it should not apply it to deportation or to misadvice. Deportation is unlike any other collateral consequence in the combination of its severity, its virtual certainty upon conviction, and the temporal continuity of deportation consequences with criminal punishment. Deportation is irreversible and life-altering, and its imposition has become more certain and less discretionary under the successive revisions to the immigration statutes. This Court, which has already recognized that competent defense counsel generally take relevant immigration law into account during criminal proceedings, *St. Cyr*, 533 U.S. at 323 n.50, should not indulge the damaging fiction that competent counsel would not attend to the deportation implications of conviction in defending the criminal prosecution of an immigrant.

Finally, even if it were *per se* reasonable under *Strickland* not to investigate and advise about collateral consequences, defense counsel's affirmative misadvice to his client about legal questions that the attorney has not adequately researched is objectively unreasonable by any measure. If defense counsel assumes the duty to advise his client and then delivers incompetent advice that induces the client to plead guilty, counsel's performance should be judged by the *Strickland* standards, as virtually every court has ruled.

On any of these grounds, Kentucky's aberrant collateral-consequences rule should fall, and this case should be remanded for a determination of Padilla's entitlement to an evidentiary hearing under state law.

ARGUMENT

I. THE COLLATERAL-CONSEQUENCES RULE IS INCOMPATIBLE WITH THE SIXTH AMENDMENT

A. Strickland v. Washington's *Two-Part Test Governs Claims of Ineffective Assistance of Counsel*

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. amend. VI. This guarantee "embodies a realistic recognition . . . that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty . . . ." *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938). The right to counsel is therefore necessarily "the right to effective assistance of counsel." *Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986). "[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel . . . ." *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

The right to effective assistance of counsel applies at every critical stage of the prosecution, including guilty pleas. *Mempa v. Rhay*, 389 U.S. 128,

134 (1967); *White v. Maryland*, 373 U.S. 59, 60 (1963).

> A guilty plea . . . is an event of signal significance in a criminal proceeding. By entering a guilty plea, a defendant waives constitutional rights that inhere in a criminal trial, including the right to trial by jury, the protection against self-incrimination, and the right to confront one's accusers. While a guilty plea may be tactically advantageous for the defendant, the plea is not simply a strategic choice; it is itself a conviction, and the high stakes for the defendant require the utmost solicitude.

Florida v. Nixon, 543 U.S. 175, 187 (2004) (citations omitted).

Ineffective-assistance claims are determined under the two-part test announced in *Strickland v. Washington*: the defendant must establish that "counsel's representation [1] fell below an objective standard of reasonableness" and [2] prejudiced the defendant. 466 U.S. 668, 687-88, 691-92 (1984); *Knowles v. Mirzayance*, 129 S. Ct. 1411, 1419 (2009).

Under *Strickland*'s first prong, reasonableness turns on whether counsel was professionally competent, not whether he was right. *Yarborough v. Gentry*, 540 U.S. 1, 8-9 (2003). The reasonableness of attorney conduct is measured by "prevailing professional norms" in effect at the time. *Strickland*, 466 U.S. at 688. Thus, the Court has looked to standards of professional conduct, such as ABA

standards, as guides to determine whether counsel's conduct is reasonable. *Id.*; *Williams v. Taylor*, 529 U.S. 362, 396 (2000); *Wiggins v. Smith*, 539 U.S. 510, 524-25 (2003); *Rompilla v. Beard*, 545 U.S. 374, 387 (2005). The Court requires this case-by-case inquiry into reasonableness because "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland*, 466 U.S. at 688-89; *Rompilla*, 545 U.S. at 381 ("A standard of reasonableness applied as if one stood in counsel's shoes spawns few hard-edged rules . . . ."). Consequently, this Court has never held a particular type of performance by a criminal defense attorney to be *per se* reasonable.

Strickland's second prong requires a defendant to establish that his counsel's objectively unreasonable performance prejudiced him. Prejudice exists in this context where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694 (noting that prejudice need not be shown by a preponderance of the evidence).

The two-part *Strickland* test applies to guilty pleas as it does to other critical phases of the criminal proceeding. *Hill*, 474 U.S. at 57. Where counsel is ineffective at the guilty-plea stage, a defendant is prejudiced if "there is a reasonable probability that, but for counsel's errors, he would not have pleaded

guilty and would have insisted on going to trial." *Id.* at 59.[5]

Notwithstanding *Hill*, the Kentucky Supreme Court did not apply the two-part *Strickland* test to Padilla's claim that his counsel's misadvice about the deportation consequences of his plea prejudiced him. The state court held that "collateral consequences are outside the scope of the guarantee of the Sixth Amendment right to counsel," and thus "it follows that counsel's failure to advise [Padilla] of such collateral issue or his act of advising [Padilla] incorrectly provides no basis for relief." Pet. App. 23. Opining that "[i]n neither instance is the matter required to be addressed by counsel," the Kentucky court held that "an attorney's failure in that regard cannot constitute ineffectiveness entitling a criminal defendant to relief under *Strickland v. Washington*." *Id.* The categorical exclusion established by the court below is inconsistent with the Sixth Amendment and this Court's precedents.

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[5] Lower courts have held that, in appropriate circumstances, a defendant may also show prejudice if the attorney's performance caused the defendant to plead guilty to harsher charges or receive a higher sentence. *See, e.g., United States v. Kwan*, 407 F.3d 1005, 1017-18 (9th Cir. 2005) (prejudice shown where defendant could have avoided deportation by persuading court or prosecutor to shorten sentence by two days); *cf. Puckett v. United States*, 129 S. Ct. 1423, 1433 n.4 (2009) (prejudice from breach of plea bargain can be shown by adverse effect on sentence); *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004) (citing *Strickland*, 466 U.S. at 694) (to show prejudice from court's plain error in administering Rule 11, the defendant "must show a reasonable probability that, but for the error, he would not have entered the plea").

B. Hill v. Lockhart *Rejected Application of the Collateral-Consequences Rule to Sixth Amendment Claims*

Hill v. Lockhart compels rejection of the collateral-consequences rule as a Sixth Amendment doctrine. In *Hill*, this Court held that while *a court* taking a guilty plea has no duty to advise a defendant regarding the collateral consequence of parole eligibility, the two-part *Strickland* test governs claims of ineffective assistance of *counsel* for misadvice on the same subject. The Kentucky court's invocation of the collateral-consequences rule to avoid *Strickland* analysis is irreconcilable with *Hill*.

Like Petitioner, Hill pleaded guilty to a felony in state court, was sentenced, and then challenged his plea on the ground that his counsel had misled him about a crucial piece of information. *Hill*, 474 U.S. at 53-55. Hill claimed his counsel had led him to believe he would be eligible for parole after serving only one third of his sentence. *Id.* However, as a repeat offender, Hill was required by statute to serve half his sentence before becoming eligible for parole. *Id.*

The Eighth Circuit panel rejected Hill's claim that due process obligated the sentencing court to inform him about parole eligibility. It held that "[t]he details of parole eligibility are considered collateral rather than direct consequences of a plea, of which a defendant need not be informed before pleading guilty." *Hill v. Lockhart*, 731 F.2d 568, 570 (8th Cir. 1984). The panel did not apply that rule to the petitioner's ineffective-assistance claim; instead, it

held that the attorney's advice did not constitute "gross misconduct" warranting vacatur of the plea. *Id.* at 571. On rehearing, an equally divided en banc court of appeals affirmed the district court. *Hill v. Lockhart*, 764 F.2d 1279 (1984).

In this Court, Hill raised only an ineffective-assistance claim, arguing that he satisfied *Strickland's* two-part test. Brief of Petitioner at 4, *Hill v. Lockhart*, 474 U.S. 52 (1985) (No. 84-1103), 1985 WL 669995. The State responded by arguing that parole eligibility was "a collateral consequence of a guilty plea," such that incorrect advice on the issue "does not render the plea involuntary." Brief of Respondent at 5, 10-19, *Hill v. Lockhart*, 474 U.S. 52 (1985) (No. 84-1103), 1985 WL 669998. Alternatively, the State contended that Hill had failed to show prejudice under *Strickland*. *Id.* at 34-40.

Even though *courts* bear no due process duty to advise defendants of collateral consequences, this Court declined to import that doctrine into the Sixth Amendment to exempt *defense counsel* from any such duty.[6] Noting the Eighth Circuit panel's "holding that parole eligibility is a collateral rather than a direct consequence of a guilty plea," this Court observed that "[w]e have never held that the United States Constitution requires *the State* to furnish a defendant with information about parole eligibility in

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[6] *In re Resendiz*, 19 P.3d 1171, 1180-81 (Cal. 2001) (discussing *Hill*); Sarah Keefe Molina, *Rejecting the Collateral Consequences Doctrine Silence About Deportation May or May Not Violate* Strickland's *Performance Prong*, 51 St. Louis U. L.J. 267, 283 (2006).

order for the defendant's plea of guilty to be voluntary, and indeed such a constitutional requirement would be inconsistent with the current rules of procedure governing the entry of guilty pleas in the federal courts." *Hill*, 474 U.S. at 55-56 (citing Fed. R. Crim. P. 11(c)) (emphasis added).

That categorical rule under the Due Process Clause and Fed. R. Crim. P. 11 did not answer the distinct question of ineffectiveness of counsel. Rather, analyzing its Sixth Amendment precedents on guilty pleas, the Court proceeded to "hold . . . that the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Id.* at 58.

Applying *Strickland,* the Court did not reach the question under the first prong of "whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel," agreeing with the State that Hill had failed to allege the requisite prejudice under the second prong of *Strickland*. *Id.* at 60. Crucially, Hill "did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial." *Id.*

Thus, under *Hill*, the categorical collateral-consequences rule that applies to Rule 11 and due process claims against the State does not dispose of ineffective-assistance claims. The question under *Strickland* is whether counsel's performance was objectively "reasonable[] under prevailing professional norms," and (if not) whether the

deficient performance was prejudicial. 466 U.S. at 687-88, 691-92. In this case, the Kentucky Supreme Court failed to conduct the required *Strickland* analysis.

C. *The Collateral-Consequences Rule Limiting Judicial Duties of Advisement Has No Place in Determining Defense Counsel's Effectiveness*

Even if *Hill* did not directly foreclose Kentucky's collateral-consequences rule, that rule conflicts with the Sixth Amendment. First, the collateral-consequences doctrine originated from Rule 11 jurisprudence to define the duties of *a court* with regard to guilty pleas. It has no bearing on the distinct and more far-reaching duties of *defense counsel* with which the Sixth Amendment is concerned. Second, *Strickland* rejects any such "mechanical rules" to define attorney duties across all criminal representations. Instead, it favors a context-specific determination of the "reasonableness" of an individual attorney's performance "under prevailing professional norms." 466 U.S. at 688. Here, the Kentucky court has impermissibly adopted a *per se* rule that an attorney never has a duty to advise the client of collateral consequences, no matter how devastating. Its conception of duty is contrary to both the most basic ethical rules and specific professional norms requiring criminal defense counsel to investigate and advise clients about the collateral consequences of conviction (especially deportation). This Court should reject the Kentucky collateral-consequences rule.

1. The collateral-consequences rule originated as a pragmatic limit on judicial duties of advisement under Federal Rule of Criminal Procedure 11

Under the Due Process Clause, a court must ensure that a defendant's guilty plea is voluntary, knowing, and intelligent. *Kercheval v. United States*, 274 U.S. 220, 223 (1927); *Walker v. Johnston*, 312 U.S. 275, 286 (1941). Accordingly, Fed. R. Crim. P. 11 has long required federal courts, before accepting a plea, to ensure that the defendant "made [the plea] voluntarily with understanding of the nature of the charge." Fed. R. Crim. P. 11 (1944).

Courts interpreted Rule 11 from its inception to "mean that the defendant should understand the 'consequences of the plea,'" and indeed a 1966 amendment added that phrase. *See Trujillo v. United States*, 377 F.2d 266, 268 (5th Cir. 1967); Fed. R. Crim. P. 11 advisory committee's note (1966). Rule 11 did not impose a duty upon courts to advise defendants "of every 'but for' consequence which follows from a plea of guilty," *Trujillo*, 377 F.2d at 268, for that would entail "judicial clairvoyance of a superhuman kind." *United States v. Cariola*, 323 F.2d 180, 186 (3d Cir. 1963). The rule emerged that so long as the court advised the defendant of the direct consequences of conviction (such as maximum or mandatory sentences), it "need not instruct an accused on all possible legal disadvantages and collateral consequences of his conviction on the charges in an indictment." *United States v. Washington*, 341 F.2d 277, 286 (3d Cir. 1965); *Durant v. United States*, 410 F.2d 689, 692 (1st Cir. 1969).

Although courts have formulated various tests for distinguishing between "direct" and "collateral" consequences,[7] the prevailing standard is whether the consequence is within the court's responsibility and control. 5 Wayne R. LaFave, et al., *Criminal Procedure* § 21.4(d) (3d ed. 2008) ("LaFave"). That approach befits the purpose of the rule as a limitation upon the trial court's duty of advisement. Because collateral consequences are often subject to manifold factual contingencies or the vagaries of state law, requiring judges to explain all of them completely would "impose upon the judge an impractical burden out of all proportion to the essentials of fair and just administration of the criminal laws." *Cariola*, 323 F.2d at 186. As one leading scholar commented:

> [I]t is simply impracticable for a trial judge to advise the defendant of all possible consequences, especially because the judge will not be aware at the time of the plea of the special circumstances which would make some of those

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[7] *See, e.g., United States v. Salerno*, 66 F.3d 544, 551 (2d Cir. 1995) (a consequence is direct if it has a definite, immediate, and largely automatic effect on the range of punishment); *Mitschke v. State*, 129 S.W.3d 130, 135 (Tex. Crim. App. 2004) (a consequence of a guilty plea is direct if it is punitive); *El-Nobani v. United States*, 287 F.3d 417, 421 (6th Cir. 2002) (a consequence is direct if it is within the "control and responsibility" of the sentencing court); Jenny Roberts, *The Mythical Divide Between Collateral And Direct Consequences Of Criminal Convictions: Involuntary Commitment Of "Sexually Violent Predators,"* 93 Minn. L. Rev. 670, 689-93 (2008) (discussing tests formulated by lower courts to define "direct" consequences).

> consequences possible, . . . *[D]efense counsel should be expected to discuss with his client the range of risks* attendant [to] his plea.

LaFave § 21.4(d) at 829 (emphasis added). Accordingly, Rule 11 does not require that the court at the allocution stage advise the defendant that he may lose his passport and voting rights, be deported, be dishonorably discharged from the armed services, or have limited eligibility for parole. *Trujillo*, 377 F.2d at 268-69; *Durant*, 410 F.2d at 692.[8]

This Court embraced the direct/collateral distinction in due process cases of the same vintage. In 1969, the Court held that a court must make a determination of a plea's voluntariness on the record by "canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." *Boykin v. Alabama*, 395 U.S. 238, 242, 243-44 (1969). Shortly thereafter, the Court clarified that a guilty plea by a properly counseled defendant was voluntary if "'entered by one fully aware of the direct consequences,'" absent coercion, threats, or improper promises or

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[8] When Rule 11 was subsequently amended in 1974 to enumerate the consequences the court had to disclose, the Advisory Committee emphasized the paramount concern with the practicality of the burdens imposed upon the court. It noted that "certain consequences of a plea of guilty, such as parole eligibility, may be so complicated that it is not feasible to expect a judge to clearly advise the defendant" at the allocution stage. Fed. R. Crim. P. 11 advisory committee's note (1974). "Similar complications exist with regard to other, particularly collateral consequences, of the plea." *Id.*

representations. *Brady v. United States*, 397 U.S. 742, 755 (1970) (quoting *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev'd on other grounds*, 356 U.S. 26 (1958) (per curiam)).

This Court has never defined the duties of defense counsel under the Sixth Amendment by reference to Rule 11/*Brady* obligations. Indeed, contemporaneously with *Boykin* and *Brady*, this Court held that a defendant is entitled to "effective assistance of counsel" in pleading guilty. The constitutional standard for such effective assistance was whether the advice "was within the range of competence demanded of attorneys in criminal cases." *McMann*, 397 U.S. at 770-71; *see also Hill*, 474 U.S. at 56. Nonetheless, many lower courts have mechanically grafted the collateral-consequences rule onto the Sixth Amendment, foregoing the standard inquiry under *McMann* and *Strickland* into whether the attorney's performance was objectively reasonable under prevailing professional norms. LaFave § 21.4(d).

There is no valid justification for extending the collateral-consequences rule to the Sixth Amendment. "The collateral consequences rule does not capture, even as a rule of thumb, . . . the concerns of competent lawyers or their clients, . . . [and] should be irrelevant to a *Strickland* analysis." Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697, 712 (2002). "Defense counsel clearly has far greater duties toward the defendant than has the court taking a plea," *Resendiz*, 19 P.3d at 1181, and the rationale for the collateral-consequences rule – the impracticality of requiring

passive judges to investigate and advise about such consequences – has no force in the Sixth Amendment context. Indeed, judges' duties to ensure the voluntariness of pleas are restricted precisely because competent counsel will provide a broader range of advice tailored to each particular defendant's needs.

2. The duties of courts do not define the duties of defense counsel

The restrictions of the collateral-consequences doctrine reflect the limited role and capability of a court taking a guilty plea. Courts are passive and neutral. Courts do not conduct investigations; they do not develop legal strategies. They do not consult with the defendant on the merits of the prosecution's case or available defenses. They do not negotiate with the prosecution. And they do not consult with the defendant on the advantages or disadvantages of a plea. *People v. Ford*, 657 N.E.2d 265, 267 (N.Y. 1995) ("a criminal court is in no position to advise on all the ramifications of a guilty plea personal to a defendant"); *Cariola*, 323 F.2d at 186; Fed. R. Crim. P. 11(c). A court's duty is limited to preventing abuses of power, which ensures that defendants are not deprived of liberty without due process of law. *See Brady*, 397 U.S. at 755-57; *Mabry v. Johnson*, 467 U.S. 504, 511 (1984).

A guilty plea results in a conviction that forfeits the defendant's constitutional rights and entails the exercise of state power. Thus, a court must create a sufficient public record showing that a defendant's plea is "voluntary in a constitutional sense." *Henderson v. Morgan*, 426 U.S. 637, 644-45 (1976); *Boykin*, 395 U.S. at 243-44. That judicial

inquiry is limited to ensuring (in the absence of coercion, improper threats, misrepresentations, or promises) that the accused understands the nature of the constitutional protections that he is waiving, *Henderson*, 426 U.S. at 645 n.13, that he has sufficient understanding of the nature of the charges such that his plea can stand as "an intelligent admission of guilt," *id.*, and that he understands the "direct consequences" of the conviction. *Brady*, 397 U.S. at 755. For due process purposes, the accused need not understand "the *specific detailed* consequences" of the plea or the rights waived thereby. *United States v. Ruiz*, 536 U.S. 622, 629 (2002). The defendant's "'lack of a full and complete appreciation of the consequences'" will not defeat "'the State's showing that the information it provided to him satisfied the constitutional minimum.'" *Iowa v. Tovar*, 541 U.S. 77, 92 (2004) (waiver of right to counsel) (quoting *Patterson v. Illinois*, 487 U.S. 285, 294 (1988)).

Unlike the court's narrow duty to ensure minimal knowledge and voluntariness, defense counsel's paramount duty is to protect the client's overall interests. "Counsel's concern is the faithful representation of the interest of his client." *Tollett v. Henderson*, 411 U.S. 258, 268 (1973). Thus, counsel must pursue "all reasonable lawful means to attain the objectives of the client." *Nix v. Whiteside*, 475 U.S. 157, 166 (1986); *see also Strickland*, 466 U.S. at 688 ("From counsel's function as assistant to the defendant derive[s] the overarching duty to advocate the defendant's cause . . . ."). Among other things, counsel must investigate facts relevant to liability and sentencing, *Rompilla*, 545 U.S. at 377; *Wiggins*,

539 U.S. at 521-22; "consult with the defendant on important decisions," *Strickland*, 466 U.S. at 688; "discuss potential strategies with the defendant," *Nixon*, 543 U.S. at 178; and predict the strength of the State's case and the likelihood of conviction, *McMann*, 397 U.S. at 769-71.

Thus, with regard to guilty pleas, counsel (unlike a court) must investigate and advise the defendant of "the advantages and disadvantages of a plea agreement." *Libretti v. United States*, 516 U.S. 29, 50-51 (1995) (noting that the Sixth Amendment duties of counsel extend beyond "the small class of rights that require specific advice from the court under Rule 11(c)"); *Brady*, 397 U.S. at 754. "Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered." *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948); *McMann*, 397 U.S. at 770-71 (counsel has a Sixth Amendment duty to provide reasonably competent advice on whether to plead guilty); Chin & Holmes, *supra*, at 727. By contrast, "the court's function and duties quintessentially *exclude* such assistance, advocacy and consultation." *Resendiz*, 19 P.3d at 1182.

Because the interests of the client define counsel's Sixth Amendment duty to defend criminal prosecutions, the distinction between collateral and direct consequences is irrelevant. The defendant is concerned with *all* significant consequences of conviction upon him and his family. The client does not care whether it is the criminal court or a subsequent governmental actor that will visit the

consequence upon him. The client seeks to minimize the overall harms. *Resendiz*, 19 P.3d at 1183.[9]

Counsel often cannot render effective assistance without investigating and advising the accused of the collateral consequences of conviction, particularly consequences as devastating as deportation. Avoiding deportation is often more critical to a defendant than avoiding incarceration or other direct consequences. *INS v. St. Cyr*, 533 U.S. 289, 322 (2001). It is "'well-documented'" that "'an alien charged with a crime . . . would factor the immigration consequences of conviction in deciding whether to plead or proceed to trial.'" *Id.* (quoting in a parenthetical *Magana-Pizano v. INS*, 200 F.3d 603, 612 (9th Cir. 1999)); *e.g.*, *Downs-Morgan v. United States*, 765 F.2d 1534, 1541 (11th Cir. 1985) (defendant, who had pleaded guilty to conspiracy to distribute marijuana and received a three-year sentence, "would certainly be imprisoned for many years and possibly be executed" if deported to communist Nicaragua). Defendants who become deportable based on criminal convictions classified as aggravated felonies cannot later (except in the rarest circumstances) avoid deportation at the immigration hearing. Tooby on Criminal Defense § 2.15.

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[9] This Court has recognized the continuing injury of conviction to defendants from deportation and other collateral consequences even after they have served their criminal sentences. *See Fiswick v. United States*, 329 U.S. 211, 221-22 (1946) (completion of defendant's sentence did not moot attack on conviction); *United States v. Morgan*, 346 U.S. 502, 512-13 (1954) (same).

Because the permanent immigration consequences greatly outweigh the criminal consequences in the vast majority of all criminal cases brought against immigrants, "the criminal defense strategy should be directed primarily to avoiding the immigration consequences, and only secondarily to minimizing the criminal judgment or sentence." *Id.* § 2.14. Avoiding deportation factors into criminal defense strategy for plea bargaining, acceptance of a plea, and sentencing. *See infra* at I(C)(4).

Accordingly, it would be "illogical and counterproductive" "to tie defense counsel's Sixth Amendment duties to the constitutional minima the due process clause requires of courts." *Resendiz*, 19 P.3d at 1182. Indeed, the minimal obligations of courts under *Brady*, *Boykin*, and Rule 11 presume that the accused has received effective assistance of counsel in deciding to plead guilty. They are rules for determining the voluntariness of pleas "made by competent defendants with adequate advice of counsel." *Brady*, 397 U.S. at 758. Courts, *Brady* declared, must scrutinize uncounseled pleas more closely because "intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney." *Id.* at 748 n.6.[10] Minimal due process and Rule 11 standards

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[10] *See also Hamilton v. Alabama*, 368 U.S. 52, 55 (1961) ("Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently."); *McMann*, 397 U.S. at 770-71 (finding plea intelligent where "based on reasonably competent advice"); *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975) ("a counseled plea of guilty" has sufficient reliability to justify the State's imposition of

(continued...)

that *presume* effective assistance of counsel cannot reasonably *define* what constitutes effective assistance.

The collateral-consequences rule is a pretender to the Sixth Amendment throne. This Court should chase it from the realm and restore *Strickland* to its rightful place.

3. *Kentucky's* per se *rule is inimical to* Strickland's *requirement of measuring attorney performance against prevailing professional norms*

Not only are the origin and rationale of the collateral-consequences rule inapposite to ineffective-assistance claims, but the decision below runs directly afoul of *Strickland*. It imposes a *per se* rule in an area where this Court has declared such rules improper. And it defines the duties of counsel contrary to the prevailing professional norms that are the touchstone of Sixth Amendment duties.

a. *Strickland* forbids *per se* rules for determining attorney competency

This Court has time and again resisted attempts to impose fixed rules delineating the

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(...continued)

punishment); *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) ("Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion . . . .").

obligations of counsel under the Sixth Amendment. *Roe v. Flores-Ortega*, 528 U.S. 470, 478-79 (2000). "Attorney errors come in an infinite variety[.]" *Strickland*, 466 U.S. at 693. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Id.* at 688-89. The Sixth Amendment does not "specify[] particular requirements of effective assistance." *Id.* at 688. Instead, it "relies . . . on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill [its] role in the adversary process . . . ." *Id.* Accordingly, "[i]n *any case* presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable *considering all the circumstances*." *Id.* (emphasis added). "Prevailing norms of practice as reflected in American Bar Association standards and the like" are helpful "guides to determining what is reasonable." *Id.*

b. Prevailing professional norms require counsel to investigate and advise clients about collateral consequences

Not only did the Kentucky Supreme Court announce an impermissible *per se* rule, but its conception of defense counsel's duty tramples on the most basic ethical rules of the profession. It held that defense counsel categorically has no duty to advise defendants about collateral consequences and no duty, if giving advice, to advise correctly. Pet. App. 36. But under ABA Model Rules in force at the time

of Padilla's plea, counsel's duties are not so limited. *See, e.g.*, Model Rules of Prof'l Conduct R. 1.1, 1.2 & 1.4 (2000).[11] Under Rule 1.2, "[a] lawyer shall abide *by a client's decisions concerning the objectives of representation* ... and shall consult with the client as to the means by which they are to be pursued." *Id.* 1.2(a) (emphasis added).[12]

Moreover, "as advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications." *Id.* Preamble [2]. The lawyer "shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." *Id.* 1.4(b); *see* Rule 1.4 cmt. [5] ("The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so.").

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[11] Kentucky has patterned its state code of professional responsibility after the ABA Model rules, with deviations not relevant here. *See* Ky. SCR 3.130 (1.1) – (8.4); Ky. Supreme Court Order Amending Supreme Court Rules 2009-05, at 98, *available at* http://apps.kycourts.net/Supreme/Rules/2009-05ORDERAMENDING.pdf. Every other state, excepting California, has adopted in whole or in part the ABA Model Rules. *See* American Legal Ethics Library, Topical Overview, Index of Narratives, *available at* http://www.law.cornell.edu/ethics/comparative/index.htm#1.1 (listing adoption status of Model Rules by state).

[12] The ABA Model Rules were revised in August 2002. Rules 1.1, 1.2, 1.4, and their commentary remain the same or substantially similar to the 2000 version.

These basic professional standards do not permit defense counsel to ignore the collateral consequences of convictions, especially devastating consequences like mandatory deportation that can be averted *only* if addressed in the criminal prosecution. Tooby on Criminal Defense, *supra*, at §§ 2.15; 2.22; Ariz. Comm. on Rules of Prof'l Conduct, Formal Op. 97-06 (1997), *available at* http://www.myazbar.org/*Ethics*/opinionview.cfm?id=482 (Notwithstanding prevailing Sixth Amendment jurisprudence, Arizona Ethical Rule 1.4(b) requires investigation and advice regarding collateral consequences, for "[t]he client obviously would find it important to consider the effect of his decision on his immigration status, or his physical safety, or any number of other aspects of his life.").

At a minimum, under prevailing professional standards, defense counsel cannot exclude collateral consequences from the representation without securing the client's informed consent. "A lawyer may limit the objectives of the representation," but only if an informed client consents after consultation and the limitation would be consistent with the requirement of competent representation. Model Rules of Prof'l Conduct R. 1.2(c) & cmt. [4-5]; Tooby on Criminal Defense, *supra*, at § 2.26. The last requirement would be difficult to satisfy. Criminal representation that forsakes the only opportunity to prevent dire collateral consequences to the client is likely incompetent.

A criminal defense attorney cannot escape these ethical duties by pleading unfamiliarity with immigration law. "A lawyer shall provide competent representation to a client. Competent representation

requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Model Rules of Prof'l Conduct R. 1.1.

> A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar . . . . A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

Id. cmt. [2]. "Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners" as well as "adequate preparation." *Id.* cmt. [5]. If defense counsel cannot provide competent representation to an immigrant defendant in this fashion, he must decline the representation (if applicable rules permit him to do so). Tooby on Criminal Defense, *supra*, at § 2.25; *Kwan*, 407 F.3d at 1015-16.

Consistent with these precepts, the ABA Standards for Criminal Justice require criminal defense counsel to investigate and advise the client regarding collateral consequences of conviction, especially deportation:

> [T]o the extent possible, defense counsel should determine and advise the

> defendant, sufficiently in advance of the entry of any pleas, as to the possible collateral consequences that might ensue from entry of the contemplated plea.

ABA Standards for Criminal Justice § 14-3.2(f) (1999).

Such advice is not to be given in the abstract, but rather based on the particular client's circumstances. "[C]ounsel should interview the client to determine what collateral consequences are likely to be important to a client's particular personal circumstances and the charges the client faces." *Id.* at § 14-3.2(f) cmt.; *see also* Chin & Holmes, *supra*, at 714. This directive to counsel recognizes the breadth of collateral consequences that may flow from a conviction – including deportation – and their importance to the defendant's decision-making process:

> An increasing burden must fall to defense counsel by virtue of the growing number and range of consequences of conviction . . . these consequences may include civil or criminal forfeiture, mandatory restitution, court martial or disqualification from the armed forces, loss of or ineligibility for licenses granted by the state, loss of civil rights, loss of federal benefits . . . and, for non-citizens, immigration consequences, to name a few. Because such discussions may involve the disclosure of privileged or incriminatory information (such as the defendant's immigration status), only defense counsel

> is in a position to ensure that the defendant is aware of the full range of consequences that may apply in his or her case.

ABA Standards for Criminal Justice § 14-3.2(f) cmt..

The ABA specifically recognizes that a trial court's last-minute, formal inquiry into the defendant's understanding of the consequences of the plea is not an adequate substitute for advice by counsel. *Id.* at 14-1.4(c) cmt. Only counsel's early, tailored advice can produce the "mature reflection" necessary to ensure that the defendant's acceptance of the plea is in fact knowing, voluntary, and intelligent. *Id.* at 14-3.2 cmt.

Moreover, standards promulgated by the National Legal Aid and Defender Association likewise declare that defense counsel should "be fully aware of, and make sure that the client is fully aware of ... consequences of conviction such as deportation" and should explain to the client the potential consequences of any plea agreement. National Legal Aid and Defender Association's Performance Guidelines for Criminal Defense Representation 6.2(a)(3), 6.3(a), 8.2(b)(8), & 8.2(c)(3) (1997), *available at* http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines.

Finally, underscoring the professional norms that defense counsel are expected to protect clients from the collateral consequences of conviction, this Court recognized (in the year before Padilla's guilty plea) that "numerous practice guides" have long been available to "competent defense counsel" regarding

strategies for avoiding the deportation consequences of conviction. *St. Cyr*, 533 U.S. at 323 n.50.[13]

Petitioner does not seek a *per* se rule for determining when counsel's investigation or advice regarding collateral consequences is incompetent; objective reasonableness is always a case-specific inquiry that considers all the circumstances. *Strickland*, 466 U.S. at 688; *Rompilla*, 545 U.S. at 387; *Rompilla*, 545 U.S. at 399-400 (Kennedy, J., dissenting). Where immigration consequences are at issue, many factors may affect the analysis. Such factors include the information available to the attorney that would have given notice of potentially grave immigration consequences; the nature of the charges, such as whether offenses that would be deemed aggravated felonies were charged; the nature of the investigation conducted or advice rendered (if any); the possibility of alternative plea bargains or sentences; and the relative materiality of direct and immigration consequences to the defendant. *See People v. Pozo*, 746 P.2d 523, 525-26, 529 (Colo. 1987). The defendant's duration of residency in the United States and family status, among other circumstances, may affect how the defendant regards deportation. A

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[13] The *Amici Curiae* Brief from the National Association of Criminal Defense Lawyers et al., cited in *St. Cyr*, 533 U.S. at 323 n.50, listed 39 published manuals, treatises, and practice guides concerning the immigration consequences of conviction, as well as numerous training sessions from before 1996. Brief for the National Association of Criminal Defense Lawyers et al. as *Amici Curiae* in Support of Respondent at apps B & C, *INS v. St. Cyr*, 533 U.S. 289 (2001) (No. 00-767), 2001 WL 306179; *see also* Chin & Holmes *supra*, at 714-18 (listing a sample of sources available by 2002, the date of Padilla's plea).

considered strategic decision by counsel not to investigate immigration consequences, if supported by reasonable professional judgment, is more likely to be found reasonable than inattention to those consequences. *Wiggins*, 539 U. S. at 533-34.

Per se rules of any stripe have no place in the determination of attorney competence under *Strickland*. [14] In resolving Padilla's ineffective-assistance claim, the proper inquiry under the first prong of *Strickland* is not whether deportation is a collateral consequence. Rather, it is, first, whether it was objectively unreasonable under prevailing professional norms at the time for Padilla's counsel to have failed to investigate whether the Kentucky offense was an aggravated felony for which deportation was effectively mandatory. Second, the inquiry is whether it was objectively reasonable for counsel, having not investigated the law, to have advised Padilla falsely that he did not need to worry about deportation consequences.

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[14] By contrast, this Court has held that certain conduct is *per se* prejudicial under the second prong of *Strickland*. That is a rule that reflects the impossibility of proving prejudice in certain contexts, such as an attorney conflict of interest affecting representation. *See, e.g., Cuyler v. Sullivan*, 446 U.S. 335, 348-49 (1980). This Court has never declared any conduct *per se* reasonable or unreasonable under the first prong of *Strickland*.

4. Defense counsel must investigate collateral consequences to reduce the direct penal consequences of conviction

Beyond its incompatibility with *Strickland*, the dichotomy between direct and collateral consequences is a false one. Defense counsel cannot ignore collateral consequences, if only because prosecutors take collateral consequences into account in charging decisions and plea bargaining, and judges take them into account in sentencing. Defense counsel thus can use information regarding collateral consequences to reduce the direct penal consequences of conviction, which no one disputes is a core duty of defense counsel.

a. Prosecutors take collateral consequences into account in charging decisions and plea bargaining

A prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). Because the sovereign's interest is not limited to simply obtaining maximum criminal punishment of the defendant, plea bargains commonly encompass collateral matters. United States Attorneys, for example, coordinate criminal prosecutions with civil investigations and may resolve civil and criminal liabilities in the plea agreement. *See* United States

Attorneys' Manual §§ 9-42.010(A), (C), (E) (1997), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/title9.htm; *Id.* at § 9-113.106 (settlement of forfeiture in conjunction with plea bargaining); *Id.* at § 9-42.451 (settlement of administrative remedies in plea bargains in Medicare fraud cases); *see also* Chin & Holmes, *supra*, at 720-23 & nn.203-09. Conversely, a United States Attorney may *decline* to prosecute based on the availability of adequate collateral civil remedies. *See* United States Attorneys' Manual §§ 9-27.220-27.250. Prosecutors also bargain for the cooperation of defendants in collateral prosecutions of other targets. *Id.* at § 9-27.420; U.S. Sentencing Guidelines Manual § 5K1.1.

Moreover, prosecutors' paramount interest in doing justice affords them discretion to take into account any "undue hardship caused to the defendant," including hardship caused by collateral consequences. National Prosecution Standards § 68.1 (2d ed. 1991), *available at* http://www.ndaa.org/pdf/ndaa_natl_prosecution_standards_2.pdf; *Dretke v. Haley*, 541 U.S. 386, 399 (2004) (Kennedy, J., dissenting) ("The rigors of the penal system are thought to be mitigated to some degree by the discretion of those who enforce the law."). The United States Attorneys' Manual expressly provides that "[p]rosecutors may consider the collateral consequences of a corporate criminal conviction or indictment in determining whether to charge the corporation with a criminal offense and how to resolve corporate criminal cases." United States Attorneys' Manual § 9-28.1000A. Recommending that prosecutors consider collateral consequences at

the plea bargaining stage, a former president of the National District Attorneys Association has stated: "[C]ollateral consequences cannot easily be charged or bargained away when justice requires them. But we must consider them if we are to see that justice is done. . . . [P]rosecutor[s] . . . must comprehend th[e] full range of consequences that flow from a crucial conviction." Robert M.A. Johnson, Message from the President: Collateral Consequences (May 2001), http://www.ndaa.org/ndaa/about/president_message_may_june_2001.html (last visited May 25, 2009).

Because prosecutors consider collateral consequences in plea bargaining, competent defense counsel investigate them for use in reducing the direct criminal punishment of the defendant. Tooby on Criminal Defense, *supra*, at §§ 2.22-23. Sometimes, prosecutors recognize that deportation would be too harsh for a particular defendant or his family given the circumstances of the crime. In other cases, they wish to reward defendants' cooperation by preventing deportation. In these cases, prosecutors may be willing to forego prosecution altogether; accept a plea to lesser counts that do not have the same severe immigration consequences; or negotiate or recommend sentences that would not trigger deportation. *See* Tooby on Criminal Defense, *supra*, at §§ 8.16-8.30; Flo Messier, *Alien Defendants in Criminal Proceedings: Justice Shrugs*, 36 Am. Crim. L. Rev. 1395, 1415-16 (1999). Thus, in *United States v. Gonzalez*, 58 F.3d 459 (9th Cir. 1995), federal prosecutors successfully moved to dismiss a count to which an immigrant defendant had pleaded guilty in order to avoid his deportation. The Government noted that he had not been properly informed by his

counsel of those consequences and had provided valuable cooperation. *Id.* at 460-63.

Moreover, some defendants have little incentive to plead guilty because they will be subject to immigration detention and deportation immediately after release from criminal custody. If a prosecutor knows that, he may sweeten the plea agreement to avoid trial. Messier, *supra*, at 1415. Defense counsel often cannot properly perform his unquestioned function of bargaining for convictions of lesser offenses or lesser criminal punishment if he fails to investigate collateral consequences.

Even where the prosecutor declines to exercise discretion in favor of the defendant, defense counsel may use collateral consequences to achieve the defendant's objectives of avoiding deportation. Counsel may bargain for the defendant to serve more time, plead guilty to greater offenses, or cooperate with the government in return for structuring the plea deal to avoid crimes that trigger mandatory deportation. Tooby on Criminal Defense, *supra*, at §§ 2.14, 8.2. "If collateral proceedings are relevant to federal prosecutors, either as add-ons or in lieu of criminal charges, it is hard to see why competent defense lawyers who are negotiating with the government should consider them categorically irrelevant." Chin & Holmes, *supra*, at 721.

b. Judges take collateral consequences into account at sentencing

"As a general proposition, a sentencing judge 'may appropriately conduct an inquiry broad in scope,

largely unlimited either as to the kind of information he may consider, or the source from which it may come.'" *Nichols v. United States*, 511 U.S. 738, 747 (1994) (quoting *United States v. Tucker*, 404 U. S. 443, 446 (1972)). "Reviewing the immigration consequences with a noncitizen defendant and counsel for both parties enables a judge to exercise discretion in entering dispositions that achieve justice for the victims and community impacted by a crime, and address potential immigration consequences for the noncitizen defendants and their families." ABA, *A Judge's Guide to Immigration Law in Criminal Proceedings* 4-17 (P. Goldberg & C. Wolchok eds., 2004) ("ABA Judge's Guide").

Many of the offenses that constitute aggravated felonies or other deportable crimes under the INA depend on the length of the sentence the court imposes. For example, for several aggravated felony categories, a conviction qualifies if the sentence imposed is a term of imprisonment of at least one year. Tooby on Criminal Defense, *supra*, at § 10.66 (listing offenses); 8 U.S.C. § 1101(a)(43)(F). Thus, counsel can avoid the defendant's deportation by convincing the court to impose a 364-day term rather than a 365-day term, *see, e.g.*, *Quintero-Morelos*, 137 P.3d at 119 (upholding sentence imposed to avoid deportation), or to impose the same term of imprisonment but on different counts. Counsel assuredly has a duty to investigate considerations (collateral or otherwise) that could result in the reduction of the imprisonment that a sentencing court imposes. *See Glover v. United States*, 531 U.S. 198, 204 (2001) (any increase in incarceration is prejudicial under *Strickland*).

Moreover, the sentencing court may wish to restructure the sentence in the defendant's favor because certain aspects of the sentence (such as work release, probation, drug rehabilitation programs, or halfway houses) cannot be served if the defendant is immediately taken into immigration custody after release from prison. Tooby on Criminal Defense, *supra*, at § 10.2; *e.g.*, *United States v. Lopez-Salas*, 266 F.3d 842, 846-51 (8th Cir. 2001) (holding that "alien status and the collateral consequences flowing therefrom may be an appropriate basis for departure").

Thus, the collateral-consequences rule is incoherent as Sixth Amendment doctrine. Kentucky may not excuse that doctrinal incoherence by arguing that applying *Strickland* to collateral-consequences advice is unduly burdensome. While in some contexts the Court may limit the application of constitutional rules "for reasons of prudence and comity" if it deems "the price of the rule to exceed its utility," this Court has held that "the Constitution constrains our ability to allocate as we see fit the costs of ineffective assistance. The Sixth Amendment mandates that the State bear the risk of constitutionally deficient assistance of counsel." *Kimmelman*, 477 U.S. at 379.

Regardless, the demanding *Strickland* test itself is the proper safeguard, as this Court held in *Hill*. *Hill*, 474 U.S. at 57-60. Because *Strickland* relies on contemporaneous professional standards as guides to determining reasonableness, it does not impose upon attorneys duties that they do not already have. *See Strickland*, 466 U.S. at 688. Moreover, "requiring a showing of 'prejudice' from defendants who seek to challenge the validity of their

guilty pleas on the ground of ineffective assistance of counsel will serve the fundamental interest in the finality of guilty pleas[.]" *Hill*, 474 U.S. at 58.

Kentucky's exclusionary collateral-consequences rule is unfounded. The Sixth Amendment is only violated if counsel renders ineffective assistance "in any criminal prosecution," U.S. Const. amend. VI, and prejudices the defendant in that prosecution, *Hill*, 474 U.S. at 59. But no fixed rules define the competency of attorney performance; the test is simply "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. The decision below is contrary to *Strickland*.

II. DEPORTATION SHOULD BE SUBJECT TO *STRICKLAND* ANALYSIS REGARDLESS OF WHETHER OTHER COLLATERAL CONSEQUENCES ARE

Even if this Court were disinclined to pronounce the fate of the collateral-consequences rule generally, this Court should not apply that rule to ineffective-assistance claims based on advice about deportation consequences.

Indeed, deportation qualifies as a "direct consequence" under some definitions of the term because it has a "definite, immediate and largely automatic effect on the range of the defendant's punishment." *See Cuthrell v. Director, Patuxent Inst.*, 475 F.2d 1364, 1366 (4th Cir. 1973). Statutory changes to the deportation regime have made it almost impossible to dub deportation "collateral" under this definition. McDermid, *supra*, at 762-64.

On the other hand, deportation (which is usually ordered in administrative removal proceedings) is collateral if the test is whether the consequence "remains beyond the control and responsibility of the district court in which that conviction was entered." *E.g.*, *United States v. Gonzalez*, 202 F.3d 20, 27 (1st Cir. 2000). But the Court need not tarry over these alternative formulations. In the area of deportation, "involving as it may the equivalent of banishment or exile, we do well to eschew technicalities and fictions and to deal instead with realities." *Costello v. INS*, 376 U.S. 120, 131 (1964).

This Court should permit ineffective-assistance claims for the failure to investigate or advise about deportation consequences of conviction because of the special nature of that sanction. Unlike many collateral consequences, deportation is as severe as (or more severe than) direct criminal punishment in many cases. It is largely automatic upon conviction, especially when the conviction is an aggravated felony, and can be defended against only in the criminal prosecution. Finally, with mandatory immigration detention, the immigrant faces continuous deprivation of liberty after the criminal conviction. Immigration consequences for persons convicted are so severe in nature and so immediately and deeply interwoven with the criminal prosecution and sentence that effective assistance of counsel must extend to protecting the accused against such consequences.

This Court has long recognized the uniquely brutal nature of permanent exclusion from one's adopted homeland. Deportation is "a savage

penalty," *Jordan v. De George*, 341 U.S. 223, 243 (1951) (Jackson, J., dissenting), "the equivalent of banishment," *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948), often resulting in the "loss of both property and life, or of all that makes life worth living," *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). Padilla, who has resided in this country since his teenage years and served honorably in its military in the Vietnam War, was 51 years old at the time of his conviction. He lives with his family in California. J.A. 44, 72, 77. He confronts a "life sentence of exile from what has become home, of separation from his established means of livelihood for himself and his family of American citizens." *Jordan*, 341 U.S. at 243 (Jackson, J., dissenting). *See also, e.g.*, David C. Koelsch, *Proceed With Caution: Immigration Consequences of Criminal Convictions*, 87 Mich. Bar J. 44, 45 (2008) (describing plight of a young woman who had come to the U.S. at age 3, but, after pleading guilty to a sentence of probation for illegal discharge of a firearm, was deported "to Russia where she no longer had family and knew no one, didn't speak the language, and had few skills needed to survive"). Deportation can be so devastating, and so disproportionate to the criminal penalties for the deportable conviction, that it should not be categorically excluded from the Sixth Amendment. As noted above, many aggravated felonies result in deportation regardless of whether any prison term is imposed, and others result in deportation for a sentence of as little as one year imprisonment. *See supra* p. 5; *cf. Scott v. Illinois*, 440 U.S. 367, 373-74 (1979) (Sixth Amendment right to counsel attaches to any proceeding in which actual imprisonment is imposed).

Moreover, the collateral-consequences rule is intended to exclude from the ambit of the Sixth Amendment not only consequences that are more trifling than criminal penalties, but also those that are contingent or speculative. *See supra* pp. 25-26. But, in the past twenty years, deportation has evolved into a "largely automatic" process after conviction, with few checks on its administration by either the executive or judicial branch. *United States v. Shaw*, No. CRIM.A. 99-525-01, Civ.A. 03-6759, 2004 WL 1858336, at *5 (E.D. Pa. Aug. 11, 2004). The remedy of cancellation of removal is available only for a defined class of immigrants, and those with aggravated felony convictions are ineligible for that relief. *See supra* pp. 5-6. For the latter, deportation, and other malign consequences, are virtually a foregone conclusion. Kesselbrenner & Rosenberg, *supra*, at § 1:7, at 1-13 ("Even a long-term permanent resident who is convicted of an aggravated felony will almost certainly be quickly deported, permanently banished, disqualified from almost all immigration benefits, subjected to mandatory detention, and penalized by a sentence of up to twenty years in prison for illegal reentry after deportation."). Where the criminal prosecution is the principal or only opportunity to prevent the potentially life-shattering consequence of deportation, the duty of effective assistance of counsel in the criminal prosecution should extend to taking reasonable steps to seek to protect the client against deportation.

Finally, in terms of practical effect, one can no longer draw distinct lines between criminal and immigration consequences. Immigration detention follows immediately once the criminal sentence of

imprisonment is served, and is mandatory for aggravated felonies. *See, e.g.*, Kesselbrenner & Rosenberg, *supra* at § 8.7, at 8-36 to 8-37; 8 U.S.C. § 1231(a)(2). Detention may last until removal is ordered. *DeMore v. Kim*, 538 U.S. 510, 531 (2003). From the vantage point of the defendant, immigration detention is simply a continued deprivation of liberty, under conditions commonly more onerous than criminal incarceration. Tooby on Criminal Defense, *supra, at* §§ 2.20, 6.34, & 6.36. After conviction, the immigrant will move immediately from criminal incarceration to immigration custody to the even more final penalty of deportation. The unbroken continuity of criminal and immigration consequences, all kindred in severity, underscores that defense counsel should have a similar duty to defend the client against the latter in the only proceeding in which defense is possible.

In short, deportation is different in kind from other collateral consequences. About half of states recognize it as uniquely similar to direct consequences in that, by statute, these states require even *trial courts* to advise defendants generally of possible deportation consequences of conviction in guilty plea proceedings. Kesselbrenner & Rosenberg, *supra,* at § 4:19, at 4-90 to 4-91 (24 States and the District of Columbia); *see also St. Cyr*, 533 U.S. at 322 n.48.[15] This Court should avoid wooden application

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[15] Such statutes require a standard general warning, regardless of the personal circumstances of the defendant. Coming so late in the process, they do not adequately substitute for a defense attorney's individualized assistance to his client. *Resendiz*, 19 P.

(continued...)

of the collateral-consequences rule in the deportation context, and hold that Padilla's claims should be resolved by traditional *Strickland* analysis.

III. THE COLLATERAL CONSEQUENCES RULE CANNOT BE EXTENDED TO PRECLUDE AN INEFFECTIVE-ASSISTANCE CLAIM BASED ON ACTUAL MISADVICE

Even if this Court were to declare that it is *per se* reasonable for defense counsel to limit their investigation and advice to exclude collateral consequences, there can be no doubt that a lawyer's *misadvising* the client on legal questions of importance to the plea, without exercising even reasonable diligence to investigate the issue, is "objectively unreasonable" in almost all circumstances. As the dissenting Justices below declared, "Counsel who gives erroneous advice to a client which influences a felony conviction is worse than no lawyer at all. Common sense dictates that such deficient lawyering goes to effectiveness." Pet. App. 26 (Cunningham, J., dissenting). Unsurprisingly, the overwhelming majority of courts that apply the collateral consequences rule to failure-to-advise claims also hold that that rule does not apply where counsel misadvises the defendant.[16]

(...continued)

3d at 1178-79; Jennifer Welch, Comment, *Defending Against Deportation: Equipping Public Defenders to Represent Noncitizens Effectively*, 92 Cal. L. Rev. 541, 555-56 (2004).

[16] *See United States v. Couto*, 311 F.3d 179, 187-88 (2d Cir. 2002); *Strader v. Garrison*, 611 F.2d 61 (4th Cir. 1979); *Sparks v.*

(continued...)

A criminal defendant is highly vulnerable in a criminal prosecution. As noted above, "the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty . . . ." *Zerbst*, 304 U.S. at 462-63. Guilty pleas in particular, because they result in convictions, demand "the utmost solicitude" for the defendant. *Nixon*, 543 U.S. at 187. "[I]ntelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney," *Brady*, 397 U.S. at 748 n.6., including an independent examination of the law as applied to the facts. *Von Moltke*, 332 U.S. at 721. Thus, the defendant necessarily relies on the accuracy of the representations defense counsel

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(...continued)

Sowders, 852 F.2d 882 (6th Cir. 1988); *United States v. Kwan*, 407 F.3d 1005, 1016-18 (9th Cir. 2005); *Beavers v. Saffle*, 216 F.3d 918 (10th Cir. 2000); *Downs-Morgan v. United States*, 765 F.2d 1534, 1541 (11th Cir. 1985); *Djioev v. State*, No. A-9158, 2006 WL 361540 (Alaska App. Feb. 15, 2006); *Alguno v. State*, 892 So. 2d 1200 (Fla. 4th DCA 2005); United States v. Shaw, No. CRIM.A. 99-525-01, Civ.A. 03-6759, 2004 WL 1858336 (E.D. Pa. Aug. 11, 2004); *Rollins v. State*, 591 S.E.2d 796, 799 (Ga. 2004); *People v. Correa*, 485 N.E.2d 307 (Ill. 1985); *Rubio v. State*, 194 P.3d 1224, 1230-31 (Nev. 2008); *State v. Garcia*, 727 A.2d 97 (N.J. Super. Ct. App. Div. 1999); *North Carolina v. Goforth*, 503 S.E. 2d 676 (N.C. App. 1998); *State v. Creary*, No. 82767, 2004 WL 351878, at *3 (Ohio App. 8 Dist. Feb. 26, 2004); *King v. State*, No. M2006-02745-CCAR3-CD, 2007 WL 3052854 (Tenn. Crim. App. Sept. 4, 2007); *State v. Rojas-Martinez*, 125 P.3d 930 (Utah 2005); *Commonwealth v. Tahmas*, Nos. 105254 & 105255, 2005 WL 2249587 (Va. Cir. July 26, 2005); *Valle v. State*, 132 P.3d 181, 184 (Wyo. 2006); *People v. McDonald*, 296 A.D.2d 13 (N.Y.A.D. 3 Dep't 2002), *aff'd*, 802 N.E.2d 131 (N.Y. 2003); *Mott v. State*, 407 N.W.2d 581, 582 (Iowa 1987); *Goodall v. United States*, 759 A.2d 1077 (D.C. 2000).

makes regarding the law and its application, for typically the defendant lacks the wherewithal to question them.

As this Court has recognized, deportation consequences will commonly be important to plea decisions, and in some circumstances the most important factor. *St. Cyr*, 533 U.S. at 322. Thus, it is a breach of trust and of the special relationship between counsel and client for counsel to render advice, without even investigating its accuracy, on matters so critical to the defendant in deciding whether to plead guilty to a felony and forfeit his constitutional rights. The Ninth Circuit so concluded in *Kwan*, reasoning that even if counsel did not have to give the defendant advice about deportation, misleading him on the subject was "objectively unreasonable under contemporary standards for attorney competence." 407 F.3d at 1015-16. Having held himself out as competent to provide advice on the subject, counsel violated "a basic rule of professional conduct that a lawyer must maintain competence by keeping abreast of changes in the law and its practice." *Id.* at 1016 (citing Model Rules of Prof'l Conduct R. 1.1[6]).

False representations that the attorney freely makes on legal matters distort the defendant's decision to plead guilty, and must be subject to *Strickland* analysis if the defendant enters a guilty plea that he would not have otherwise made. It is common to draw a line in the law based on the decision to speak in circumstances where one induces reliance. For example, absent an independent duty to speak, silence will not give rise to liability for negligent misrepresentation. But if a professional

supplies false information that induces justifiable reliance by others, he will be liable for failing to exercise due care. *Restatement (Second) of Torts* § 552 (1965).[17] On the same principle, if a lawyer supplies false information about deportation consequences that affects the defendant's decision to plead guilty, the lawyer has been ineffective in assisting the defendant, even if he had no duty to investigate collateral consequences in the first place. "One would not suppose that the collateral consequence rule . . . would apply in a situation in which defendant's guilty plea was induced by actual misadvice respecting some collateral consequence when that consequence was of substantial importance to the defendant." *Mott v. State*, 407 N.W.2d at 583-84 (internal quotation marks omitted). "If the defendant's pleas were made in reasonable reliance upon the advice or representation of his attorney, which advice or representation demonstrated incompetence, then it can be said that the defendant's pleas were not voluntary[.]" *People v. Correa*, 485 N.E.2d at 310; *accord Strader*, 611 F.2d at 65. *See also Evitts v. Lucey*, 469 U.S. 387 (1985) (State has no obligation to provide appeal, but must assure effective assistance of counsel if appeal is provided).

Indeed, this Court has held that guilty pleas may be withdrawn if the defendant was prejudicially induced to plead guilty by representations or promises in the plea agreement that did not come to

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[17] Every error in interpreting and applying immigration law will not be grounds for a finding ineffective assistance; the standard is incompetence. *See supra* Part I(C)(3).

be. *See Santobello v. New York*, 404 U.S. 257, 262 (1971). In *Brady*, the Court recognized that misrepresentation by the court, the prosecutor, or his own counsel that induces a plea may invalidate it. 397 U.S. at 755. In the same vein, false representations by incompetent counsel on the critical issue of deportation that prejudicially induce a guilty plea should give rise to a Sixth Amendment claim.

Moreover, any policy justifications for relieving counsel of an affirmative duty to investigate collateral consequences would not justify exempting misadvice. There can be no concern of overburdening counsel with inquiry into manifold collateral consequences where counsel has stepped forward to advise the client on a specific collateral consequence. Moreover, if defense counsel is not prepared to do the spadework to advise competently on deportation consequences, he should refrain from giving possibly inaccurate advice, or apprise the client that he should consult immigration counsel. But, when counsel undertakes to advise on a specific matter, he must do so competently. Indeed, the act of giving advice may deter the defendant from seeking immigration advice elsewhere. The reason for any categorical exemption having vanished, counsel's performance is thus subject to analysis under *Strickland* for objective reasonableness and possible prejudice within the criminal prosecution.

Thus, while the collateral-consequences rule as a whole is incoherent as Sixth Amendment doctrine, at a minimum there is no reason to extend it to prevent claims of ineffective assistance for misadvice. The courts have recognized misadvice on deportation

for thirty years as a ground for ineffective assistance claims, *see Strader,* 611 F.2d 61, and the system has handled the few claims that arise without difficulty.

Here, defense counsel specifically told Padilla that he "did not have to worry about immigration status since he had been in the country so long." J.A. 72. Padilla accordingly accepted a plea of slim benefit, falsely induced by his own lawyer to believe that his immigration status was unaffected by the plea. Counsel's advice was mistaken, and "had counsel properly advised" him that he would be deported if convicted of felony drug trafficking, Padilla "would have gone to trial." J.A. 72-73. Padilla is entitled to have his ineffective-assistance claims resolved under *Strickland.*

IV. THE CASE SHOULD BE REMANDED FOR A DETERMINATION OF WHETHER PADILLA IS ENTITLED TO AN EVIDENTIARY HEARING UNDER STATE LAW

Under Kentucky rules of criminal procedure, a hearing on a motion for post-conviction relief "is required if there is a material issue of fact that cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by an examination of the record." *Fraser*, 59 S.W.3d at 452. "The trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them." *Id.* at 452-53.

Applying this state-law standard, the Kentucky Court of Appeals held "[t]he record does not refute [Padilla's] allegation that counsel [had]

affirmatively assured him he would not be deported as a result of pleading guilty; nor does it refute his claim that but for counsel's mistaken advice, he would not have pled guilty." Pet. App. 36. It accordingly concluded that "Padilla is entitled to an evidentiary hearing on his motion." *Id.* The Kentucky Supreme Court did not reach this state-law question because of its misplaced reliance on the collateral-consequences rule. This Court should reject the collateral-consequences rule, and remand to the state court for further proceedings.

CONCLUSION

The judgment of the Kentucky Supreme Court should be reversed.

Respectfully submitted,

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Sixth Amendment to the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

8 U.S.C. § 1101(a)(43)(B), (M), (P), (R), (S)

8 U.S.C. § 1101 [2002]. Definitions

(a) As used in this chapter--

(43) The term "aggravated felony" means--

(B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18);

(M) an offense that--

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of Title 26 (relating to tax evasion)

in which the revenue loss to the Government exceeds $10,000;

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of Title 18, or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

8 U.S.C. § 1227(a)(2)(A)(iii), (B)(i)

8 U.S.C. § 1227 [2002]. Deportable aliens

(a) Classes of deportable aliens – Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(2) Criminal offenses

(A) General crimes

(iii) Aggravated felony – Any alien who is convicted of an aggravated felony at any time after admission is deportable.

(B) Controlled substances

(i) Conviction – Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign

country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

8 U.S.C. § 1229b(a)-(c)

8 U.S.C. § 1229b [2002]. Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents – The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien--

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general – The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is

inadmissible or deportable from the United States if the alien--

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

8 U.S.C. § 1231(a)(2)

8 U.S.C. § 1231 [2002]. Detention and removal of aliens ordered removed

(a) Detention, release, and removal of aliens ordered removed

(1) Removal period

(A) In general – Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the

alien from the United States within a period of 90 days (in this section referred to as the "removal period").

(B) Beginning of period – The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

(2) Detention – During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) [criminal grounds] or 1227(a)(4)(B) of this title.

Ky. Rev. Stat. Ann. § 218A.1421

Ky. Rev. Stat. §218A.1421 Trafficking in marijuana; penalties

(1) A person is guilty of trafficking in marijuana when he knowingly and unlawfully traffics in marijuana.

(2) Trafficking in less than eight (8) ounces of marijuana is:

(a) For a first offense a Class A misdemeanor.

(b) For a second or subsequent offense a Class D felony.

(3) Trafficking in eight (8) or more ounces but less than five (5) pounds of marijuana is:

(a) For a first offense a Class D felony.

(b) For a second or subsequent offense a Class C felony.

(4) Trafficking in five (5) or more pounds of marijuana is:

(a) For a first offense a Class C felony.

(b) For a second or subsequent offense a Class B felony.

(5) The unlawful possession by any person of eight (8) or more ounces of marijuana shall be prima facie evidence that the person

possessed the marijuana with the intent to sell or transfer it.

Ky. Rev. Stat. Ann. § 532.055

Ky. Stat. Ann. § 532.055 Verdicts and sentencing by jury in felony cases

(1) In all felony cases, the jury in its initial verdict will make a determination of not guilty, guilty, guilty but mentally ill, or not guilty by virtue of insanity, and no more.

(2) Upon return of a verdict of guilty or guilty but mentally ill against a defendant, the court shall conduct a sentencing hearing before the jury, if such case was tried before a jury. In the hearing the jury will determine the punishment to be imposed within the range provided elsewhere by law. The jury shall recommend whether the sentences shall be served concurrently or consecutively.

(b) The defendant may introduce evidence in mitigation or in support of leniency; and

(c) Upon conclusion of the proof, the court shall instruct the jury on the range of punishment and counsel for the defendant may present arguments followed by the counsel for the Commonwealth. The jury shall then retire and recommend a sentence for the defendant.

Ky. Rev. Stat. Ann. § 532.060(2)

Ky. Stat. Ann. § 532.060 Sentence of imprisonment for felony

(1) A sentence of imprisonment for a felony shall be an indeterminate sentence, the maximum of which shall be fixed within the limits provided by subsection (2), and subject to modification by the trial judge pursuant to KRS 532.070.

(2) The authorized maximum terms of imprisonment for felonies are:

(c) For a Class C felony, not less than five (5) years nor more than ten (10) years;

Ky. Rev. Stat. Ann. § 532.110(1)(a)

532.110 Concurrent and consecutive terms of imprisonment

(1) When multiple sentences of imprisonment are imposed on a defendant for more than one (1) crime, including a crime for which a previous sentence of probation or conditional discharge has been revoked, the multiple sentences shall run concurrently or consecutively as the court shall determine at the time of sentence, except that:

(a) A definite and an indeterminate term shall run concurrently and both sentences shall be satisfied by service of the indeterminate term;

501 Ky. Admin. Regs. 1:030

501 Ky. Admin. Regs. 1:030. Determining parole eligibility

Section 3. Parole Eligibility. (1) Initial parole review date. Except as provided by Section 2 of this administrative regulation, a person confined to a state penal institution or county jail shall have his case reviewed by the board, in accordance with the following schedules:

(a) If convicted of a felony offense after December 3, 1980:

Sentence Being Served	*Time Service Required Before First Review (Minus Jail Credit)*
1 year, up to but not including 2 years	4 months
2 years, up to and including 39 years	20% of sentence
More than 39 years, up to and including life	8 years
Persistent felony offender I in conjunction with a Class A, B, or C felony	10 years

Ky. Rule of Professional Conduct 1.1

Ky. Supreme Court Rule 3.130(1.1)
Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Ky. Rule of Professional Conduct 1.2

Ky. Supreme Court Rule 3.130(1.2)
Scope of representation

(a) A lawyer shall abide by a client's decision concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the objectives of the representation if the client consents after consultation.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall inform the client regarding the relevant limitations on the lawyer's conduct.

Ky. Rule of Professional Conduct 1.4

Ky. Supreme Court Rule 3.130(1.4)
Communication

(a) A lawyer should keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer should explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Ky. Rule of Criminal Procedures 11.42

Ky. Rule of Crim. Proc. 11.42

11.42 Motion to vacate, set aside or correct sentence

(1) A prisoner in custody under sentence or a defendant on probation, parole or conditional discharge who claims a right to be released on the

ground that the sentence is subject to collateral attack may at any time proceed directly by motion in the court that imposed the sentence to vacate, set aside or correct it.

(2) The motion shall be signed and verified by the movant and shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds. Failure to comply with this section shall warrant a summary dismissal of the motion.

(3) The motion shall state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding.

(4) The clerk of the court shall notify the attorney general and the Commonwealth's attorney in writing that such motion (whether it be styled a motion, petition or otherwise) has been filed, and the Commonwealth's attorney shall have 20 days after the date of mailing of notice by the clerk to the Commonwealth's attorney in which to serve an answer on the movant.

(5) Affirmative allegations contained in the answer shall be treated as controverted or avoided of record. If the answer raises a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing and, if the movant is without counsel of record and if financially unable to employ counsel, shall upon specific written request by the movant appoint counsel to represent the movant in the proceeding, including appeal.

(6) At the conclusion of the hearing or hearings, the court shall make findings determinative of the material issues of fact and enter a final order accordingly. If it appears that the movant is entitled to relief, the court shall vacate the judgment and discharge, resentence, or grant him or her a new trial, or correct the sentence as may be appropriate. A final order shall not be reversed or remanded because of the failure of the court to make a finding of fact on an issue essential to the order unless such failure is brought to the attention of the court by a written request for a finding on that issue or by a motion pursuant to Civil Rule 52.02.

(7) Either the movant or the Commonwealth may appeal from the final order or judgment of the trial court in a proceeding brought under this rule.

(8) The final order of the trial court on the motion shall not be effective until expiration of time for notice of appeal under RCr 12.04 and shall remain suspended until final disposition of an appeal duly taken and perfected.

(9) Original applications for relief of the nature described in this Rule 11.42 that are addressed directly to a court other than the one in which the sentence was imposed shall be transmitted to the court in which the sentence was imposed for further disposition in the manner above set forth.

(10) Any motion under this rule shall be filed within three years after the judgment becomes final, unless the motion alleges and the movant proves either:

(a) that the facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence; or

(b) that the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

If the judgment becomes final before the effective date of this rule, the time for filing the motion shall commence upon the effective date of this rule. If the motion qualifies under one of the

RESPONDENT'S BRIEF

No. 08-651

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

JOSE PADILLA,

Petitioner,

versus

COMMONWEALTH OF KENTUCKY,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Kentucky

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1. Does the Sixth Amendment require counsel to give advice about potential civil deportation consequences in a criminal case?

2. May advice about civil collateral matters beyond the scope of representation in a criminal proceeding violate the Sixth Amendment?

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STATEMENT

Petitioner Jose Padilla was arrested for smuggling over half a ton of marijuana (1,033 pounds) in his tractor-trailer. R. 1-2, 5, 38; J.A. 47-49, 50-52. With the aid of competent counsel, Padilla obtained a favorable guilty plea whereby he limited his prison sentence to five years rather than the ten years possible for the most serious charged offense. R. 38, 44-48; J.A. 50-52, 61-68. Nearly two years after the entry of his final judgment, Padilla became dissatisfied with his plea agreement and sought post-conviction relief under Kentucky Rule of Criminal Procedure (RCr) 11.42. J.A. 71-74.

In his *pro se* post-conviction motion, Padilla alleged for the first time that his trial counsel had advised him that he did not have to worry about his immigration status since he had lived in the United States so long. J.A. 72-73. Padilla further alleged that but for this misadvice regarding his immigration status he would not have pleaded guilty, but instead, insisted on going to trial. J.A. 73. After multiple levels of review, the Kentucky Supreme Court rejected Padilla's claim of counsel ineffectiveness. Kentucky's highest court found that advice on a collateral consequence, such as deportation, is beyond the scope of the Sixth Amendment. Further, the Kentucky Supreme Court found no appreciable difference between the absence of advice on a collateral matter and counsel's misadvice on a collateral matter. Pet. App. 23; *Commonwealth v. Padilla*, 253 S.W.3d 482 (Ky. 2008). Having faithfully applied this Court's

precedent, the Kentucky Supreme Court's decision should be affirmed.

A. Facts Underlying Padilla's Convictions

On September 17, 2001, Padilla was arrested in Hardin County, Kentucky, after authorities discovered over 1000 pounds of marijuana during a search of his tractor-trailer. R. 1-2, 5, J.A. 47-49. Padilla was formally indicted for trafficking in marijuana, a class C felony, for "possessing with the intent to sell or transfer approximately 1033 pounds of marijuana in [a] semi-tractor trailer," and three other lesser offenses. J.A. 47-49. Prior to his decision to plead guilty, Padilla sought to suppress evidence seized during a search of his tractor-trailer. R. 25-27.

During the subsequent evidentiary hearing on Padilla's motion to suppress, the Commonwealth presented the testimony of Inspector Scott Dennis, an officer with Kentucky Vehicle Enforcement, indicating that he performed a "driver paperwork safety inspection" because he was unfamiliar with the trucking company indicated on Padilla's truck. R. 32. In the course of the paperwork check Inspector Dennis noticed Padilla's nervous behavior and the fact he was "off route," and asked for consent to search. R. 32-33. Padilla's written/signed consent to search his truck, trailer, person, and belongings was made an exhibit during the suppression hearing and placed in the record. R. 30.

Items suggesting personal use of marijuana, including a green leafy material, were found in the passenger compartment of the truck, which resulted in Padilla being placed under arrest. R. 33. Padilla was informed of his rights under *Miranda v. Arizona*, 384 U.S. 436, 478 (1996), and executed a signed waiver of those rights. R. 31, 33. Then, with Padilla's assistance, the trailer he was hauling was searched. The officers found 23 wrapped styrofoam boxes not accounted for in the shipping manifest. When asked what was inside, Padilla responded "maybe drugs." R. 33. Padilla also indicated to police that he had been paid by someone to transport the boxes in question. R. 34. Ultimately, the 23 styrofoam boxes were found to contain approximately 1033 pounds of marijuana. R. 33. Finding both Padilla's consent to search and his waiver of rights to be valid, the Kentucky trial court overruled the motion to suppress the evidence seized during the search and Padilla's statements to police. R. 34.

Thereafter, Padilla accepted the prosecution's plea offer and submitted his motion to enter an "unconditional guilty plea"[1] on a standardized Kentucky form entitled, "Motion to Enter Guilty Plea," in which

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[1] Kentucky Rule of Criminal Procedure (RCr) 8.09 authorizes, with the approval of the court, the entry of a conditional guilty plea. A conditional guilty plea preserves a defendant's right to appeal adverse rulings and provides a right to withdraw the plea if the defendant prevails on appeal. Padilla did not seek to enter a conditional plea.

he affirmatively acknowledged and waived his constitutional rights and expressly certified that his guilty plea was being entered, "freely, knowingly, intelligently and voluntarily." J.A. 50-52; R. 38. Pursuant to the plea agreement, a judgment convicting Padilla of Possession of Marijuana;[2] Possession of Drug Paraphernalia;[3] and Trafficking in Marijuana, Greater than Five Pounds[4] was entered in the written record on October 4, 2002. J.A. 61-68; R. 44-48. For these crimes Padilla was sentenced as recommended in the plea offer to a total sentence of ten years, with five years to serve and five years to be probated. J.A. 61-68; R. 44-48.

Had Padilla insisted on going to trial, he would not have had any viable defenses and would have certainly been convicted. He would have also risked being sentenced to serve ten years imprisonment rather than the five years bargained for in the plea agreement.

B. Post-Conviction Facts and Proceedings

Padilla's motion to enter a guilty plea was accepted in open court on August 22, 2002. J.A. 57-60. Thereafter, on September 17, 2002, Padilla again appeared for the pronouncement of judgment and

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[2] KRS 218A.1422 (Class A Misdemeanor)

[3] KRS 218A.500(2) (Class A Misdemeanor)

[4] KRS 218A.1421 (Class C Felony)

final sentencing on his plea of guilty. That judgment was reduced to writing and entered into the record on October 4, 2002. J.A. 61-68; R. 44-48. At no point during this time period did Padilla express any dissatisfaction with his counsel nor did Padilla express any concern for his immigration status.

Nearly two years after entry of final judgment and just months before his ultimate release from incarceration, Padilla sought post-conviction relief; alleging for the first time that his counsel had misadvised him of the effect his plea may have on his immigration status. J.A. 71-74; R. 58-61. The Commonwealth was not required to, and chose not to respond to Padilla's motion. R. 72; Pet. App. 42; *See Polsgrove v. Commonwealth*, 439 S.W.2d 776 (Ky. 1969).

On September 14, 2004, the Hardin Circuit Court rendered its Findings of Fact, Conclusions of Law and Order Denying RCr 11.42 Motion, in which it found that "Padilla was thoroughly questioned, and there is no question that his plea was a knowing, intelligent and voluntary action on his part." R. 72-76; Pet. App. 41-44. Noting that a valid guilty plea does not require that a defendant be informed of every possible consequence of that plea, and that Padilla was aware of the possibility of deportation and discussed that possibility with counsel, the Hardin Circuit Court denied Padilla's allegation of ineffective assistance of counsel. *Id.* Padilla served out his prison sentence

and was released from custody on November 11, 2004.[5]

C. Decisions On Appeal

On appeal, the Kentucky Court of Appeals, in a split decision (2-1), reversed the judgment of Hardin Circuit Court and remanded the case for an evidentiary hearing to determine whether or not Padilla had been misadvised and whether that misadvice prevented Padilla from entering a knowing, intelligent and voluntary guilty plea. Pet. App. 29-40. Judge Henry dissented in part because he did not find credible Padilla's assertion that a brief statement by his defense counsel concerning the possibility of deportation affected the voluntariness of his plea. Pet. App. 37-38.

In a 5-2 decision, the Kentucky Supreme Court reversed the Kentucky Court of Appeals and reinstated the trial court's judgment denying Padilla's post-conviction challenge. Pet. App. 19-23. Essentially, the Kentucky Supreme Court agreed with the Commonwealth that the "failure to advise" and "misadvice" are not meaningfully distinguishable with regard to collateral consequences such as deportation, the right to vote, or the right to possess firearms. Pet.

---

[5] Release date obtained from the Kentucky Department of Corrections, Official Resident Record Card for Padilla.

App. 21. In either case, a misunderstanding, or even a complete lack of awareness, of a collateral matter does not fundamentally affect the voluntariness of the waiver of constitutional rights upon entry of the guilty plea. Pet. App. 21. Thus, the Kentucky Supreme Court held that: "[a]s collateral consequences are outside the scope of the guarantee of the Sixth Amendment right to counsel, it follows that counsel's failure to advise Appellee of such collateral issue or his act of advising Appellee incorrectly provided no basis for relief." Pet. App. 23.

SUMMARY OF THE ARGUMENT

Neither this Court nor the federal circuits have held that the trial court or defense counsel must inform defendants of all possible consequences flowing from a guilty plea. The only duty of the trial court is to ensure that the defendant understands the "direct" consequences of the plea. That is the consistently held position of every federal circuit to have considered the issue.

1. For a guilty plea to be voluntary in a constitutional sense a defendant need only understand the direct consequences of his or her plea. *Brady v. United States*, 397 U.S. 742, 755 (1970). To ensure voluntariness, this Court requires trial courts to confirm, on the record, a defendant's understanding of the direct consequences of his or her plea and their understanding of the constitutional rights being

waived by pleading guilty. *Boykin v. Alabama*, 395 U.S. 238 (1969). This limitation is consistent with the fundamental purpose of the Sixth Amendment, i.e. to protect a defendant's right to "a fair and intelligent determination of guilt." *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

A defendant's misunderstanding of a collateral matter does not affect that defendant's understanding of the right to trial by jury, right of confrontation, the protection against self-incrimination, or any other right waived when pleading guilty. Padilla makes no claim that his counsel's allegedly deficient advice affected his ability to understand the rights he waived. Further, Padilla makes no assertion of actual innocence and it is evident that his alleged misunderstanding of his deportation risk did not affect the validity of his admission of guilt.

It is nearly impossible to catalogue all of the potential collateral consequences of a criminal conviction. Collateral consequences are typically civil in nature and beyond the scope of attorney representation in a criminal case. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) ("the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorney in criminal cases.'"). Accordingly, the ineffective assistance inquiry approved in *Hill* seeks to ensure that a defendant voluntarily entered his guilty plea. And this Court has already established in *Brady* and *Boykin* that for a plea to be voluntary a defendant

need only know the direct consequences of conviction and understand the rights being waived.

The Sixth Amendment issue in this case is not "'. . . what is prudent or appropriate, but only what is constitutionally compelled.'" *Burger v. Kemp,* 483 U.S. 776, 755 (1987); *citing United States v. Cronic*, 466 U.S. 648, 665 n.38 (1984). Advice about potential consequences collateral to a criminal prosecution is not a cognizable basis for claiming counsel ineffectiveness. Not every word uttered by an attorney implicates the Sixth Amendment. The right to "counsel for his defence" contemplates a criminal prosecution, not a civil proceeding. The scope of attorney representation in a criminal case is necessarily finite. Criminal defense counsel must focus on issues affecting innocence or guilt and punishment. One who retains counsel for the specific purpose of defending a criminal charge cannot reasonably expect the representation to include other matters. The client and the lawyer both know that the scope of representation is limited to the criminal charge. Thus, the Sixth Amendment does not envision a duty on the part of criminal defense counsel to dispense advice concerning every possible aspect of the client's future. Advice extraneous or peripheral to the protection of specific constitutional rights is not itself possessed of constitutional dimension.

2. Any distinction drawn between the "failure to advise" and "affirmative misadvice" would be arbitrary. The validity of a guilty plea in either case hinges on the voluntariness of the plea. When

evaluating the voluntariness of the plea, a criminal defendant's knowledge and understanding of the direct consequences of that plea are the central inquiry and the basis for any misunderstanding is immaterial. The constitution does not compel defense counsel to advise a criminal defendant on all collateral matters because those matters fall well outside the criminal proceeding. A criminal defense attorney's act of gratuitously offering such advice does not somehow change the collateral nature of the advice nor create a drastically new distinction in the constitutional analysis.

Strikingly absent in all of the contrary cases relied on by Padilla, is any legal or rational basis for holding that misadvice could constitute ineffective assistance of counsel under the Sixth Amendment. Instead, a close inspection of those cases reveals result-driven opinions that seem to rely on a general "feeling" that misadvice is bad. While the desire to provide a remedy for criminal defendants who have received bad advice is laudable, there is simply not a rational basis for elevating misadvice on a collateral matter to a constitutional infirmity.

3. State and federal criminal trial courts do not control deportation proceedings. Even had Padilla mentioned his immigration status prior to his guilty plea, neither the prosecutor nor the trial judge could have bound the immigration authorities. For that reason, the potential of deportation by immigration authorities must continue to be viewed as a consequence collateral to the criminal proceeding.

Padilla urges this Court to declare that the potential of deportation is a collateral consequence too terrible to be treated as such. Padilla's brief, at pp. 51-54, actually suggests that deportation is as bad or worse than imprisonment. Surely even Padilla would concede that is not always the case. (Deportation to a favorable country or a country in which the defendant still has family or other connections is far better than a death sentence, life imprisonment, or other significant penal sanction.) Padilla does not identify anything in the Bill of Rights forfeited by reason of attorney advice or misadvice. He is reduced to arguing that but for attorney advice about a collateral consideration, he would have weighed the benefits of his plea bargain differently. Such a claim is simply not cognizable. Creating special protections for non-citizens from collateral matters will increase litigation by citizens concerning why the collateral consequence they hold so important should not be treated like deportation.

4. Even if this Court should decide to expand the protections granted by the Sixth Amendment to Padilla's situation, Padilla himself is still not entitled to relief from his Kentucky conviction. Padilla has not demonstrated and cannot demonstrate how the criminal proceeding was fundamentally unfair or that he suffered prejudice necessitating reversal under the second prong of *Strickland v. Washington*, 466 U.S. 668, 684-86 (1984).

ARGUMENT

I. THE SIXTH AMENDMENT DOES NOT GUARANTEE A CRIMINAL DEFENDANT LEGAL ADVICE CONCERNING COLLATERAL CONSEQUENCES, SUCH AS DEPORTATION.

A. Padilla's Guilty Plea Was Voluntary.

Effective assistance of trial counsel as guaranteed by the Sixth Amendment " . . . extends to and encompasses only those activities which tend to protect a criminal defendant; right to a fair and intelligent determination of guilt or innocence." *Commonwealth v. Fuartado*, 170 S.W.3d 384, 386 (Ky. 2005), *citing Strickland v. Washington*, 466 U.S. 668, 686 (1984). When determining whether or not a guilty plea is being voluntarily entered the inquiry must focus on the defendant's understanding of the direct consequences of his plea. *Brady v. United States*, 397 U.S. 742, 755 (1970).

In *Brady*, this Court reiterated the standard as to the voluntariness of guilty pleas holding that,

> "[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature

> improper as having no proper relationship to the prosecutor's business (e.g. bribes)."

Id. at 755 (quoting *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957)). It must be presumed that this Court purposely focused on "direct consequences" when referring to the type of information a defendant must be fully informed of before pleading guilty. *United States v. Sambro*, 454 F.2d 918, 922 (D.C. Cir. 1971). This limitation makes perfect sense given the fundamental purpose of the Sixth Amendment is protect a criminal defendant's right to "a fair and intelligent determination of guilt or innocence." *Fuartado*, 170 S.W.3d at 386, *citing Strickland v. Washington*, 466 U.S. 668, 686 (1984).

Padilla's misunderstanding of his deportation risk did not affect his understanding of the constitutional rights he waived during the entry of a guilty plea or the consequences he would have faced as a direct result thereof. "By entering a guilty plea, a defendant waives constitutional rights that inhere in a criminal trial, including the right to trial by jury, the protection against self-incrimination, and the right to confront one's accusers." *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (citations omitted). A criminal defendant's misunderstanding of a collateral matter does not affect that defendant's understanding of his or her constitutional rights he or she waives when pleading guilty. Furthermore, a misunderstanding of a collateral matter does not affect the validity of a criminal defendant's admission in open

court to committing charged acts. *See Sambro*, 454 F.2d at 921-22.

This Court's precedents require only that a criminal defendant be fully aware of the "direct consequences" of a guilty plea in order for that plea to be voluntary in a constitutional sense. Further, it is the duty of the trial court to ensure a criminal defendant's guilty plea is voluntarily entered. *Kercheval v. United States*, 274 U.S. 220, 223 (1927); *Walker v. Johnston*, 312 U.S. 275, 286 (1941). In *Boykin v. Alabama*, 395 U.S. 238, 243-44 (1969), this Court re-emphasized the trial court's responsibility and mandated that the trial judge create a sufficient record evidencing the voluntariness of a guilty plea to permit meaningful review of voluntariness on appeal. Thus, under *Boykin* trial courts customarily engage a defendant in a colloquy in open court to ensure the defendant's full understanding of the direct consequences of his guilty plea and understanding of the constitutional rights he or she is waiving.

Padilla has never claimed that he did not commit the crimes to which he pleaded guilty, nor made any claim that would even question his full understanding of the direct consequences of his plea. Likewise, Padilla has not even alleged that his misunderstanding of his deportation risk had any effect on his full understanding of the constitutional rights he waived when pleading guilty. Any error in counsel's assessment of Padilla's deportation risks was an "ordinary error" as described in *McMann v.*

Richardson, 397 U.S. 759, 770 (1970) ("It is no denigration of the right to trial to hold that when the defendant waives his state court remedies and admits guilt, . . . , he assumes the risk of ordinary error in either his or his attorney's assessment of the law and fact."). It simply does not offend the constitutional protections afforded to Padilla to hold that he assumed that risk. Thus, under this Court's precedents the trial court properly fulfilled its obligation to ensure the voluntariness of Padilla's guilty plea.

In *United States v. Ruiz*, 536 U.S. 622 (2002), this Court, again focusing on direct consequences, held that guilty pleas may remain voluntary despite the fact a defendant labors under misapprehensions of direct aspects of the case. Summarizing several prior holdings, this Court found: " . . . that the Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor." *Id.* at 630 (citations omitted). *See also Mabry v. Johnson*, 467 U.S. 504, 509 (1984) (disapproved of on other grounds by *Puckett v. United States*, 129 S.Ct. 1423 (2009)).

In *Brady*, a defendant's guilty plea was constitutionally voluntary despite the fact that the defendant misapprehended the quality of the state's case, the likely penalties, and of his attorney's failure to anticipate a favorable change in law regarding

punishment. *Brady*, 397 U.S. at 757. Likewise, this Court found that misjudging the admissibility of a confession, *McMann v Richardson*, 397 U.S. 759, 770 (1970), and counsel's failure to discover a constitutional infirmity in a grand jury proceeding, *Tollett v. Henderson*, 411 U.S. 258, 267 (1973), did not render a criminal defendant's guilty plea involuntary.

The defendants in *Brady*, *McMann*, and *Tollett* all misunderstood or lacked material information that related directly to the criminal proceeding yet this Court found that none of their misapprehensions rendered their respective pleas involuntary. Padilla, on the other hand, concedes that he fully understood the direct consequences of his plea as well as his constitutional rights; i.e. the right to a trial, to confrontation, to not testify, to appeal, etc. Further, Padilla does not dispute that he is in fact guilty. Because Padilla is guilty and because he possessed full knowledge and understanding of the direct consequences of his decision to plead guilty, that plea was voluntarily made.

Consistent with those rulings, this Court has never required trial courts to address collateral consequences with defendants who are pleading guilty. It follows, then, that the Court has long concluded that knowledge of the myriad of collateral consequences to a conviction is not needed for a plea to be voluntary.

The reason that advising defendants on the collateral consequences of a guilty plea should not be

elevated under the Sixth Amendment is due, in part, to the varying types and degrees of collateral consequences that exist. In short, collateral consequences are numerous and broad-sweeping. They range from the obvious (inability to hold public office – Ky. Const. § 150) to the inconspicuous (removal from the Board of Directors of the United States Institute of Peace – 22 U.S.C. § 4605(f)(1)). While traditional collateral consequences are more well-known, such as the commonly understood loss of civil rights and liberties (e.g., restrictions on the right to vote, to drive a car, or to own a firearm), state and federal statutes also impose a great number of less apparent collateral consequences. For example, in Kentucky, an "exploration of the Kentucky Revised Statutes reveals hundreds of collateral consequences that affect ex-offenders upon their release from incarceration." Troy B. Daniels et al., *Kentucky Statutory Collateral Consequences Arising From Felony Convictions: A Practitioner's Guide*, 35 N. Ky. L. Rev. 413 (2008). *See also* U.S. Department of Justice, *Federal Statutes Imposing Collateral Consequences Upon Conviction* (visited July 24, 2009) <http://www.usdoj.gov/pardon/collateral_consequences.pdf>.

The traditional consequences merely scratch the surface of the variety of ways that a convicted defendant can face consequences unrelated to his actual crime and sentence. For example, a defendant can face property forfeiture, penalty enhancements on future crimes, offender registration (e.g., violent or sexual offender registration), or losses affecting his/her ability to receive public housing, to purchase

or be served alcohol, to live in certain places, to receive student loans, to enlist in the U.S. military, to hold certain public jobs, to gain certain professional licenses (or loss/suspension of a held license), and to serve on a jury – just to name a few. Also, in some instances, collateral consequences have been defined so broadly as to include familial consequences, such as child support arrearage, termination of parental rights, loss of child custody/visitation, or forced adoption, etc. Similarly, collateral consequences have been generally defined to include the negative impact convicted felons often have on disadvantaged communities. Examples include increased risk of homelessness for released felons, greater likelihood of poverty, the likelihood of recidivism, the risk of contracting infectious diseases while incarcerated (that go untreated before release), and lack of treatment for drug abuse and/or mental illness. Given the breadth and diversity of the consequences noted, placing a duty on defense counsel to be aware and advise a defendant of any likely collateral consequence would be overly burdensome and wholly impractical.

Because misunderstanding a collateral consequence is independent of the constitutional rights waived in a guilty plea, voluntariness is not affected. The difference between collateral consequences of a criminal conviction and direct consequences is one of kind, not degree. Understanding collateral consequences is not essential to a voluntary plea. The relative importance of a collateral consequence to a

particular defendant does not give rise to a constitutional right to be apprised of, or a negative outcome to be relieved from, if misadvised. To do so would open the door to innumerable challenges to pleas based on incorrect advice regarding a multitude of collateral consequences.[6]

Further, opening the inquiry on voluntariness to include collateral matters would greatly lessen the certainty and finality sought by use of the plea process. *See United States v. Timmreck*, 441 U.S. 780 (1978). In *Timmreck*, this Court unanimously denied habeas corpus relief to a petitioner who challenged the voluntariness of his plea because he was not aware of the mandatory parole term associated with his sentence. *Id.* Further, this Court cautioned that:

> Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. **The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas.** Moreover, the concern that unfair

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[6] Although Padilla claims to be a legal resident, his arguments would extend to illegal immigrants, which, as this Court has recognized, have no legal entitlement to remain in the United States. *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 488 and 491-492 (1999); *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 44 (2006).

> procedure may have resulted in the conviction of an innocent defendant is only rarely raised by a petitioner to set aside a guilty plea.

Id. at 784 (emphasis added).

Similarly, in *McMann, supra* (where the petitioner alleged his plea was involuntary because he and his counsel misjudged the admissibility of his confession) this Court refused to invalidate the guilty plea in part to avoid, " . . . an improvident invasion of the State's interest in maintaining the finality of guilty-plea convictions that were valid under constitutional standards applicable at the time." 397 U.S. at 774.

B. Collateral Matters Do Not Directly Impact the Voluntariness of a Guilty Plea.

This Court's holdings in *Hill v. Lockhart*, 474 U.S. 52 (1985), and *McMann v. Richardson*, 397 U.S. 759 (1970), do not bring collateral matters into the inquiry when reviewing the voluntariness of a guilty plea. While it is true that those cases tie voluntariness of a guilty plea to the performance of counsel, the performance of counsel must be judged within the narrow confines of the criminal proceeding. In *Hill,* this Court applied the two prong *Strickland* test to challenges to guilty pleas based on ineffective assistance of counsel. 474 U.S. at 58. It was concluded that, "the voluntariness of the plea

depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" *Id.* at 56; quoting *McMann,* 397 U.S. at 771; *See also Tollett v. Henderson*, 411 U.S. 258 (1973) (a defendant must show that counsel's advice violated the standard espoused in *McMann* in order to attack a guilty plea.). It would be a drastic expansion of the holdings in those cases for the minimum level of competence guaranteed by the Sixth Amendment to include competence on the myriad of collateral matters a person may face by pleading guilty to a felony offense.

Accordingly, the ineffective-assistance inquiry approved of in *Hill* seeks to ensure the voluntariness of a defendant's guilty plea. As mentioned in the preceding argument, this Court has established in *Brady*, *Boykin*, *etc.*, that a criminal defendant need only possess full knowledge of the direct consequences of his plea and understanding of the constitutional rights being waived for his or her guilty plea to voluntary.

By advocating that the voluntariness of his guilty plea is dependent on the reasonableness or effectiveness of counsel's advice with regard to collateral consequences, Padilla is essentially asking this Court to abandon *Boykin* and its progeny. In practice, any trial judge that diligently follows the requirements of *Boykin* and/or Fed. R. Crim. P. 11, but fails to inquire into the defendant's knowledge and understanding of collateral consequences, such as deportation, no

longer ensures that the guilty plea the court accepts is being made voluntarily.

Under Padilla's proposed rule no judicial inquiry, short of direct questioning regarding the content and reasonableness of counsel's advice regarding deportation and direct questioning of Padilla's understanding of his deportation risk, would have been adequate to ensure the voluntariness of Padilla's plea. Because it may be nearly impossible to identify what collateral consequence may ultimately be of significance to a particular criminal defendant, Padilla's rule would have the practical effect of causing the judiciary to interject itself into the attorney-client relationship and to second guess whether a defendant has been sufficiently advised of all of the collateral consequences to his or her guilty plea. *Boykin* and its progeny establish a rule under which, regardless of what counsel says to the defendant, the court can ensure the plea is voluntarily made. A rule that would make a plea involuntary if the defendant is not made aware of some or all collateral consequences cannot be reconciled with *Boykin*.

In every circuit to have addressed this issue, it is well-settled that there is no affirmative duty under the Sixth Amendment to advise a criminal defendant of collateral consequences. *United States v. Fry*, 322 F.3d 1198, 1200 (9th Cir. 2003), citing *United States v.*

Banda, 1 F.3d 354, 356 (5th Cir. 1993).[7] The holding in *Hill v. Lockhart* is not contrary to this firmly entrenched rule. In *Hill* the Court expressly refrained from determining whether or not misadvice regarding a collateral matter (parole eligibility) could constitute ineffective assistance of counsel under the Sixth Amendment. 474 U.S. at 60. Instead, it was stated that:

> In the present case the claimed error of counsel is erroneous advice as to eligibility for parole under the sentence agreed to in the plea bargain. App. 31. We find it unnecessary to determine whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel, because in the present case we conclude that petitioner's allegations are insufficient to satisfy the *Strickland v. Washington* requirement of "prejudice."

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[7] *accord United States v. Gonzalez*, 202 F.3d 20, 25 (1st Cir. 2000); *Varela v. Kaiser*, 976 F.2d 1357, 1358 (10th Cir. 1992), cert. denied, 507 U.S. 1039 (1993); *United States v. Del Rosario*, 902 F.2d 55, 59 (D.C. Cir. 1990), cert. denied, 498 U.S. 942 (1990); *Santos v. Kolb*, 880 F.2d 941, 945 (7th Cir. 1989), cert. denied, 493 U.S. 1059 (1990); *United States v. Yearwood*, 863 F.2d 6, 7-8 (4th Cir. 1988); *United States v. Campbell*, 778 F.2d 764, 769 (11th Cir. 1985); *United States v. Santelises*, 509 F.2d 703, 704 (2d Cir. 1975) (*per curiam*); *United States v. Couto*, 311 F.3d 179, 187 (2d Cir. 2002); *El-Nobani v. United States*, 287 F.3d 417, 421 (6th Cir. 2002); *United States v. Romero-Vilca*, 850 F.2d 177, 179 (3d Cir. 1988).

Id. This Court abstained from making a decision on this issue because it was determined that Hill failed to demonstrate prejudice under the second prong of *Strickland*.

C. Ethical Obligations Are Not Constitutional Requirements.

While certain rights flow to a criminal defendant from the right to counsel, duties stemming from ethical obligations are not the same as constitutional requirements. *See Montejo v. Louisiana*, ___ U.S. ___, 129 S.Ct. 2079, 2087 (2009) ("the Constitution does not codify the ABA's Model Rules"). Padilla repeatedly refers to the American Bar Association's Model Rules and suggests that they establish professional norms for constitutionally effective counsel. To the contrary, as this Court has noted, to the extent that they are relevant, the Model Rules merely serve as a guide for evaluating the reasonableness of an attorney's representation. *See Strickland*, 466 U.S. at 687 ("Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice . . . are guides to determining what is reasonable, but they are only guides.") (emphasis added); *Nix v. Whiteside*, 475 U.S. 157, 165 (1986) ("breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel").

Further, Justice Kennedy's dissenting opinion in *Rompilla v. Beard*, 545 U.S. 374, 399-400 (2005)

pointed out that this Court has " . . . warned in the past against the creation of 'specific guidelines' or 'checklist[s] for judicial evaluation of attorney performance.'" *Id.*, *citing Strickland*, 466 U.S. at 688; *See also Wiggins v. Smith*, 539 U.S. 510, 521 (2003); *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). Historically, this Court has resisted creating specific guidelines for evaluating the performance of counsel because:

> "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause." *Strickland*, 466 U.S., at 688-689, 104 S.Ct. 2052 (citations omitted).

Rompilla v. Beard, 545 U.S. 374, 399-400 (2005) (KENNEDY, J., dissenting opinion). Because no set of particular rules will be sufficient to govern defense counsel's conduct under the Sixth Amendment, Justice Kennedy further pointed out that, "while we have referred to the ABA Standards for Criminal Justice as a useful point of reference, we have been

careful to say these standards 'are only guides' and do not establish the constitutional baseline for effective assistance of counsel." *Ibid.* Likewise, the American Bar Association, parroting Justice Kennedy, concedes in their amicus brief filed in this case that, "[t]he ABA Standards do not provide per se rules or a 'checklist' for judicial evaluation of attorney performance, nor do they purport to establish the constitutional baseline for effective assistance of counsel." ABA's Amicus Brief at 3.

Padilla's repeated reliance on *INS v. St. Cyr*, 533 U.S. 289 (2001) is misplaced. Simply put, the constitutional issue central to Padilla's case was not before this Court in *St. Cyr*. At most this Court briefly discussed (in footnote 50) what it assumed was "prudent and appropriate" functions for counsel to perform. However, in *Burger v. Kemp*, 483 U.S. 776, 794 (1987), this Court clarified that with regard to the Sixth Amendment the issue is not "' . . . what is prudent or appropriate, but only what is constitutionally compelled.'" *Citing United States v. Cronic*, 466 U.S. 648, 665 n.38 (1984). In *State v. Rojas-Martinez*, 125 P.3d 930 (Utah 2005), the Utah Supreme Court criticized the same expansive interpretation of *St. Cyr* that Padilla makes in his brief. The Utah Supreme Court further explained its understanding of *St. Cyr* stating that, "[t]he practice standards referenced by the Supreme Court were not accompanied by any language that would suggest that it was the Court's intention to cloak these practice guidelines in constitutional garb." *Id.* at 937-38.

While it may be preferable for defense attorneys to advise their criminal clients of the collateral consequences of a favorable guilty plea, such advice is not required under the Sixth amendment. This Court should heed its own warnings and refrain from elevating the ABA's model rules to constitutional minimums for criminal defense lawyers. For, "[a] public defender or attorney in private practice who represents defendants in criminal cases should not be found to be 'ineffective' for failing to advise his client about a body of civil law which is not directly related to the issues involved in a Crim. P. 11 hearing." *People v. Pozo*, 746 P.2d 523, 533 (Colo. 1987) (ROVIRA, J., dissenting opinion).

The rule that defense counsel are not required to advise defendants regarding the collateral consequences of a criminal conviction fairly balances a criminal defendant's Sixth Amendment right and "the fundamental interest in the finality of guilty pleas." *Hill*, 474 U.S. at 58. While the Sixth Amendment assures an accused of effective assistance of counsel in criminal prosecutions, this assurance does not extend to collateral aspects of the prosecution. Actual knowledge of the consequences that are collateral to the guilty plea is not a prerequisite to the entry of a knowing and intelligent plea. On this issue, as conceded by Padilla, the States and the U.S. Circuit Courts are not split.

II. COUNSEL'S FAILURE TO ADVISE A CRIMINAL DEFENDANT OF POSSIBLE COLLATERAL CONSEQUENCES IS INDISTINGUISHABLE FROM ALLEGED MISADVICE CONCERNING COLLATERAL CONSEQUENCES.

As shown in Section I, a guilty plea is voluntary, and therefore may not be withdrawn, if a defendant is made aware of the direct consequences of the conviction and the rights being waived. Failure by defense counsel to give advice regarding collateral consequences, such as deportation, do not bear on the direct consequences of the plea or the defendant's waiver of rights. Because failure to advise cannot be the basis for withdrawal of a guilty plea, voluntariness is unaffected and a defendant's Sixth Amendment right to counsel is not implicated. It logically follows that misadvice about consequences that are collateral to a criminal conviction also cannot form the basis for a Sixth Amendment claim. A guilty plea is valid even if counsel affirmatively misinformed the defendant about the plea's deportation consequences. *See United States v. Sambro*, 454 F.2d 918, 921-22 (D.C. Cir. 1971); *United States v. Parrino*, 212 F.2d 919, 921-22 (2d Cir. 1954), cert. denied, 348 U.S. 840 (1954).

"[F]aithful representation" of a client means "that an attorney must consult with the client fully on matters of a constitutional magnitude." *Tollett v. Henderson*, 411 U.S. 258, 272 (1973). "If a prisoner pleads guilty on the advice of counsel, he must

demonstrate that the advice was not 'within the range of competence demanded of attorneys in criminal cases.'" *Id.* (*citing McMann v. Richardson*, 397 U.S. 759, 771 (1970)). As has been discussed, deportation is not a direct consequence of a guilty plea and does not fall within the purview of counsel's constitutional obligations when advising a client during the plea process. *See United States v. Banda*, 1 F.3d 354, 356 (5th Cir. 1993). The range of competence must be limited to advice that pertains to matters directly stemming from the criminal proceeding. Immigration law is not within the range of competence associated with criminal attorneys; it is beyond the scope of attorney representation in a criminal case. This is particularly important because immigration law is a highly-specialized, dynamic legal subject and its parameters continue to evolve. *See, e.g., Nijhawan v. Holder,* 129 S.Ct. 2294 (2009). Incorrect advice about a criminal conviction's potential effect on a future civil (removal) proceeding, involving an agency of the federal government, applying federal immigration law, is collateral to the plea and sentence on which counsel is advising and cannot constitute ineffective assistance of counsel during the criminal proceeding. The right of an accused to "the assistance of counsel for his defence," U.S. Const. Amend. VI, does not include the right to accurate forecasting of matters outside the context of a criminal case.

Any distinction between the failure to advise and misadvice about collateral matters is arbitrary; there should be no legal distinction. In both instances, a

defendant's understanding of the direct consequences and his constitutional waiver of rights is unchanged. Advice that is not constitutionally compelled by the Sixth Amendment's right to counsel does not become a constitutional violation by virtue of counsel's giving of advice on a collateral matter. This rationale was acknowledged below when it was held that because,

> collateral consequences are outside the scope of the guarantee of the Sixth Amendment right to counsel, it follows that counsel's failure to advise [Padilla] of such collateral issue or his act of advising [Padilla] incorrectly provides no basis for relief. In neither instance is the matter required to be addressed by counsel, and so an attorney's failure in that regard cannot constitute ineffectiveness entitling a criminal defendant to relief under *Strickland v. Washington*.

Commonwealth v. Padilla, 253 S.W.3d 482, 485 (Ky. 2008).

In assessing the impact of collateral consequences in relation to the Sixth Amendment, there is no genuine difference between an act of commission and an act of omission. Such a premise has a sound basis in many areas of the law. For example, in assessing contractual obligations, a "breach of contract" has been defined as "the commission of an act, or the omission of some act, specified or implied in the contract". *Dulworth v. Hyman*, 246 S.W.2d 993, 995 (Ky. 1952). Determinations of negligent conduct also utilize rules that do not differentiate between a party's actions or a failure to act. *See NKC Hospitals*,

Inc. v. Anthony, 849 S.W.2d 564, 567 (Ky. App. 1993) ("[n]egligence may rest on an omission as comfortably as positive acts; the consequence is the same"). Similar principles apply when establishing criminal liability; *See* KRS 501.030(1) – "A person is not guilty of a criminal offense unless . . . (1) He has engaged in conduct which concludes a voluntary act or the omission to perform a duty which the law imposes upon him. . . ." In each of these contexts, there is no logical differentiation between acting and failing to act – the ultimate outcome is the same. Whether it is an allegation of failure to advise or misadvice about deportation consequences, a criminal defendant's personal assessment of the direct consequences and constitutional waivers remains the same. In each instance the result is a valid, voluntary plea.

Padilla's assertions of overwhelming support for his position are illusory. *See* Petitioner's Brief, pg. 55, fn. 16. When reviewing the cited cases, one is confronted with a set of result-driven, incestuous decisions that are completely lacking in legal or rational bases.[8] Of the three federal circuits confronting the

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[8] Of the six federal circuits cited (at Brief for Petitioner, pg. 55, fn. 16), three of the cases designated as support (from three unique circuits) relate to misadvice regarding parole eligibility rather than deportation – *Strader v. Garrison*, 611 F.2d 61 (4th Cir. 1979), *Sparks v. Sowders*, 852 F.2d 882, 885 (6th Cir. 1988) (*citing Strader*), and *Beavers v. Saffle*, 216 F.3d 918, 925 (10th Cir. 2000) (*citing Sparks*). Parole eligibility is inapplicable in this context because it is more like a direct consequence – as it relates to actual custody under a sentence of conviction by a State. Deportation, on the other hand, is not under the control of

(Continued on following page)

issue of whether misadvice with respect to immigration consequences can constitute ineffective assistance of counsel under the Sixth Amendment, none offer any legal foundation for their conclusions. Notably, in *Downs-Morgan v. United States*, 765 F.2d 1534, 1541 (11th Cir. 1985), the first such opinion, the conclusion of the court rested entirely upon its facts, which included allegations that upon a return to Nicaragua, Downs-Morgan believed he would be subjected to imprisonment for many years and/or execution. In a footnote at the end of the opinion authorizing a remand, the *Downs-Morgan* Court stated that "[w]e emphasize the narrowness of our decision. We do not hold . . . that an affirmative misrepresentation by counsel in response to a specific inquiry about the possibility of deportation or exclusion, without the additional factors of imprisonment and execution, is sufficient to warrant collateral relief." *Downs-Morgan*, 765 F.2d at 1541 fn. 15. Over time, and due to repeated citation, it appears the narrowness of this decision has been mistakenly eroded.

In *United States v. Couto*, 311 F.3d 179 (2d Cir. 2002), the Second Circuit Court of Appeals, held that an affirmative misrepresentation regarding immigration consequences was objectively unreasonable. *Couto*, 311 F.3d at 187. The conclusory holding in

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the States and does not directly relate to the criminal proceeding in any fashion. From that basis, the two are not comparable.

Couto was made without explanation of any kind.[9] The Ninth Circuit Court of Appeals followed with *United States v. Kwan*, 407 F.3d 1005 (9th Cir. 2005), and found that Kwan's attorney had affirmatively misled Kwan and such advice was objectively unreasonable. The primary basis for *Kwan's* holding was *Couto* (and *Downs-Morgan* in a footnote). Noting similar facts from *Couto*, the *Kwan* Court did little to explain the elevation of immigration misadvice to a colorable claim under the Sixth Amendment right to counsel.[10]

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[9] The application of the holding in *Couto* to Padilla's case is also unclear because the *Couto* holding was driven by the fact that Couto was, unlike Padilla, subject to the expedited immigration proceedings of 8 U.S.C. § 1228(b)(5) for non-resident permanent aliens or conditional resident aliens. Assuming Padilla's intimations are true – that he is a permanent resident alien – he is not subject to the expedited procedures.

[10] In *Kwan*, in addition to detailing the factual similarities of *Couto*, the Ninth Circuit cited to the ABA Standards of Criminal Justice as support for its conclusion that misadvice regarding deportation could be ineffective assistance of counsel. In particular, the *Kwan* Court cited to this Court's opinion in *INS v. St. Cyr*, 533 U.S. 289 (2001), where it was noted that the ABA standards provided that "if a defendant will face deportation as a result of a conviction, defense counsel 'should fully advise the defendant of these consequences.'" *St. Cyr*, at 323 n. 48 (quoting 3 ABA Standards for Criminal Justice 14-3.2 Comment, 75 (2d ed.1982)). Reliance by the *Kwan* Court on this standard in this context is misplaced. According to the standard, defense counsel has an affirmative duty to advise a client regarding deportation consequences. However, pursuant to *United States v. Fry*, 322 F.3d 1198, 1200 (9th Cir. 2003), the Ninth Circuit had previously held that an attorney's failure to

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The majority of States that have reached similar conclusions have relied on these federal cases as support – particularly in cases that post-date 2002. *See* Alaska – *Djioev v. State*, No. A-9158, 2006 WL 361540 (Alaska App. Feb. 15, 2006) (unpublished) (primarily relied on *Kwan*, but also cited to *Couto* and *Downs-Morgan*); Georgia – *Rollins v. State*, 591 S.E.2d 796, 799 (Ga. 2004) (*citing Downs-Morgan*); Nevada – *Rubio v. State,* 194 P.3d 1224, 1230-31 (Nev. 2008) (*Couto* and *Kwan* – footnoted *Downs-Morgan*); New York – *People v. McDonald*, 745 N.Y.S.2d 276 (N.Y. Ct. App. 2002) (*Downs-Morgan*); Ohio – *State v. Creary*, No. 82767, 2004 WL 351878 (Ohio App. 8 Dist. Feb. 26, 2004) (*Couto*); Utah – *State v. Rojas-Martinez*, 125 P.3d 930 (Utah 2005) (*Couto*); Virginia – *Commonwealth v. Tahmas*, Nos. 105254 & 105255, 2005 WL 2249587 (Va. Cir. Ct. July 26, 2005) (*Couto* and *Kwan*); and Wyoming – *Valle v. State*, 132 P.3d 181, 184 (Wyo. 2006) (*Couto* and *Kwan*).[11]

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advise a client of the immigration consequences of a conviction does not constitute ineffective assistance of counsel under *Strickland*. It is illogical that the ABA standard supporting an affirmative duty to advise on deportation would cause misadvice to elevate to a potential claim of ineffective assistance of counsel in *Kwan*, when it did not elevate the affirmative duty itself in *Fry*.

[11] In fact, of the cases cited by the Petitioner representing thirteen different States which have dealt with this issue, eight jurisdictions cited the seminal federal cases as support. Of those that did not, the Illinois case pre-dated the significant federal cases while Florida, Iowa, and Tennessee relied on their own precedent. New Jersey relied on federal case law from one of the

(Continued on following page)

Noticeably absent from any of Padilla's support is explicit, detailed reasoning for concluding that misadvice on collateral matters is a constitutional infirmity. On the contrary, these cases reveal a dearth of support and a perfunctory determination of the ultimate issue. The cases seem to be relying on a "feeling" that misadvice is bad – rather than a logical connection to an identifiable constitutional right. Nevertheless, this Court has never held that the right to counsel is implicated in the context of collateral consequences. As an obvious extension, it has never been held that bad advice from defense counsel on collateral consequences that follow a felony conviction are a constitutional basis to invalidate a guilty plea or trial. Elevating misadvice on collateral consequences to a cognizable claim under the Sixth Amendment right to counsel would amount to a drastic expansion of the law regarding ineffective assistance of counsel.

The difference between collateral consequences of a criminal conviction and direct consequences is one of kind or type, not degree of importance. Advice regarding potential consequences collateral to the criminal proceeding cannot form a basis for claiming counsel ineffectiveness. The relative importance of a collateral consequence to a particular defendant does not create a constitutional right. To do so would open

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aforementioned Court of Appeals cases regarding misadvice on parole eligibility.

the floodgates wherein pleas are challenged based on incorrect advice regarding any and all types of consequences collateral to a valid plea. Because the scope of criminal defense is limited, it must pertain only to advice regarding the criminal charge. This reasoning compels the conclusion that misadvice regarding a collateral consequence, because it does not bear on direct consequences or the waiver of rights, cannot justify withdrawing a guilty plea by claiming counsel ineffectiveness. A defendant does not have to have an understanding of collateral consequences in order to enter a voluntary plea. Misunderstanding a collateral consequence is independent of the direct consequences of a guilty plea and the constitutional rights being waived; therefore, voluntariness is not affected.

III. DEPORTATION SHOULD NOT BE TREATED DIFFERENTLY THAN OTHER COLLATERAL CONSEQUENCES.

In Argument II of his brief (pp. 50-55), Padilla persists in challenging the voluntariness of his plea, through a claim of ineffectiveness of counsel, by asking this Court to treat deportation differently than other collateral matters. It is well-settled that deportation is a consequence collateral to a criminal conviction and there is no logical or legal justification for treating deportation differently than other collateral matters.

Despite Padilla's attempt to liken deportation to a direct consequence, it is widely accepted deportation is collateral to a criminal proceeding. Presently, all circuits that have addressed the issue " . . . have concluded that deportation is a collateral consequence of the criminal process and hence the failure to advise does not amount to ineffective assistance of counsel." *United States v. Fry*, 322 F.3d 1198, 1200 (9th Cir. 2003), *citing United States v. Banda*, 1 F.3d 354, 356 (5th Cir. 1993). Because deportation does not stem directly from the conviction and because the sentencing court has no power over deportation decisions it is clear that a criminal defendant's risk of deportation is collateral to any criminal conviction. In *United States v. Gonzalez*, 202 F.3d 20, 27 (1st Cir. 2000), the First Circuit explained that "[w]hat renders the plea's immigration effects collateral is not that they arise virtually by operation of law, but the fact that deportation is not the sentence of the court which accepts the plea but of another agency over which the trial judge has no control and for which he has no responsibility." The collateral nature of deportation is most obvious in relation to a state court criminal proceeding. Kentucky ultimately has no role whatsoever in determining whether or not Padilla will be deported.[12]

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[12] In fact, should a state actor (judge or prosecutor) make concessions to circumvent deportation, such action would be invalid. *In re Sanusi v. Gonzales*, 474 F.3d 341 (6th Cir. 2007) (court action not based on a procedural or substantive defect is invalid if done to circumvent deportation).

Primarily, Padilla argues that deportation is unique because of the quasi-automatic nature of deportation for aggravated felons. However, Padilla concedes on page 33 of his brief that even an aggravated felon may sometimes avoid deportation. Padilla himself has managed to avoid incarceration and deportation since he was released by the Kentucky Department of Corrections on November 8, 2004. J.A. 77 (Padilla's release date obtained from his Official Resident Record Card maintained by the Kentucky Department of Corrections).

Padilla attempts to frame defense counsel as the "last line of defense"; as "counsel who are aware of immigration consequences achieve significant victories for their clients in the criminal prosecution by crafting trial and plea bargaining strategies to avoid conviction of offenses that may be classified as aggravated felonies." Brief of Pet. at 7. However, criminal defense counsel may be characterized as the "last line of defense" for any criminal defendant wishing to avoid any one of a myriad of civil collateral consequences that arise automatically.[13] The mere fact that a number of civil collateral consequences, such as deportation or the loss of a citizen's right to

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[13] *See* U.S. Department of Justice, *Federal Statutes Imposing Collateral Consequences Upon Conviction* (visited July 24, 2009) <http://www.usdoj.gov/pardon/collateral_consequences.pdf; *also see* Troy B. Daniels *et al.*, *Kentucky Statutory Collateral Consequences Arising From Felony Convictions: A Practitioner's Guide*, 35 N. Ky. L. Rev. 413 (2008).

vote or bear arms, are automatic does not change the collateral nature of those consequences. The criminal sentencing court has no authority or control over civil consequences arising from a criminal conviction and thus, those consequences are collateral.

Further, the law on the issue of immigration is in flux, and determinations as to whether a defendant is deportable in a separate civil proceeding is not always apparent or automatic. For example, substantial litigation exists as to what constitutes an "aggravated felony" and what must be proved in that context. *See, e.g., Nijhawan v. Holder*, 129 S.Ct. 2294 (2009); *Lopez v. Gonzales*, 549 U.S. 47 (2006); *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (*abrogating Le v. United States Attorney General*, 196 F.3d 1352 (11th Cir. 1999)).

The importance Padilla or other convicts may place on deportation, or any one of a myriad of other collateral consequences, does not somehow convert these collateral matters into direct consequences of a criminal proceeding. "The loss of one's right to vote, exclusion from military service, or other disabilities attached to a felony conviction may be just as harsh a consequence to a citizen defendant as deportation may be to an alien." *People v. Pozo*, 746 P.2d 523, 532 (Colo. 1987) (ROVIRA, J., dissenting opinion).

Excepting deportation from the collateral consequence doctrine simply because of the importance many non-citizens may place on that consequence, as suggested by Padilla, is unfair and will

only spur additional litigation. Citizens will seek similar protection arguing that a particular collateral consequence is just as important to them as deportation is to a non-citizen and will justifiably complain that granting non-citizens greater protection from collateral matters than citizens is unfair. Attempting to treat deportation differently than other collateral matters will open the Pandora's box of collateral matters that will have to be addressed individually by the courts, thereby further overburdening an overtaxed judicial system. *See Pozo*, 746 P.2d at 533 (dissenting opinion).

Ultimately, attempting to carve out an exception to the collateral consequences rule for immigration matters is unworkable. This Court has held that the constitutional standard focuses on attorney competence in criminal cases, not civil or administrative cases. "Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" *Hill v. Lockhart*, 474 U.S. 52, 56 (1985), *quoting from McMann v. Richardson*, 397 U.S. 759, 771 (1970). Immigration law is civil/administrative in nature and is constantly in flux. This Court should not constitutionally mandate that advice be given with regard to immigration consequences simply because those consequences arise automatically or because of the importance some criminal defendants may place on those issues.

IV. PADILLA WAS NOT PREJUDICED BY HIS TRIAL COUNSEL'S ALLEGED MISADVICE.

Even if this Court should choose to drastically expand its current precedent to grant Sixth Amendment protection to criminal defendants who receive misadvice regarding collateral consequences, Padilla has still failed to demonstrate how his counsel's allegedly deficient performance prejudiced him. To establish prejudice Padilla must be able to show that, " . . . there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). In *Roe v. Flores-Ortega*, 528 U.S. 470, 484-486 (2000), this Court further explained that the decision to reject the plea and insist on going to trial must be rational. Imposing logic and reason as a component of the prejudice component of *Hill* and *Strickland* suggest an "objective" inquiry. *See Meyer v. Branker*, 506 F.3d 358, 369 (4th Cir. 2007). Therefore, the prejudice inquiry should include evaluation of the strategic considerations impacting the plea process; i.e. likelihood of conviction or acquittal and likely length of sentence, when determining whether insisting on a trial would have been a rational choice.

Padilla's self-serving affidavit falls well short of demonstrating there was a "reasonable probability" he would have actually demanded a jury trial given the overwhelming evidence against him and the favorable terms offered in the plea agreement. *See Evola v. Carbone*, 365 F.Supp.2d 592 (D.N.J. 2005)

(holding that the Petitioner could not show prejudice – the only evidence Evola would have insisted on going to trial came from his own self-serving statements and he did not make a claim of innocence or address the favorableness of his plea deal), *aff'd by Evola v. Atty. Gen. of U.S.*, 190 Fed.Appx. 171 (3rd Cir. 2006) (unpublished). Padilla voluntarily consented to a search of his truck and trailer. The search led to the discovery that Padilla was smuggling more than one thousand pounds of marijuana through Kentucky. Pursuant to KRS 218A.1421, trafficking in more than five pounds of marijuana (an amount Padilla exceeded by approximately 1000 pounds) is a class C felony – with a penalty range of five to ten years in prison. Padilla unsuccessfully tried to challenge his incriminating statements to police, his consent to search, and the probable cause to arrest him. R. 30-34. Padilla had no apparent defenses to the charges against him. Given these circumstances, Padilla's conviction at trial was certain.

It is not reasonable to believe that Padilla would have been convicted of any lesser charge or that a jury would have recommended a sentence more favorable than the minimum prison time Padilla received by pleading guilty. Given the overwhelming evidence of his guilt, Padilla cannot rationally show that but for his counsel's advice, he would have insisted on going to trial. In fact, there was more than a substantial risk that a jury would have recommended that Padilla be sentenced to the maximum term of ten years given the substantial amount of

marijuana he was attempting to smuggle through Kentucky. By pleading guilty, Padilla received substantial leniency.

Generally, "defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation." *Mickens v. Taylor*, 535 U.S. 162 (2002). The "prejudice" component of the *Strickland* analysis focuses on whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. *United States v. Cronic*, 466 U.S. 648, 687 (1984). "It is true that while the *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims, there are situations in which the overriding focus on fundamental fairness may affect the analysis." *Williams v. Taylor*, 529 U.S. 362, 391 (2000). Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him. *Id.* at 393, fn. 17; *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993).

For instance, in *Williams v. Taylor*, *supra*, this Court concluded that counsel's error violated Taylor's federal constitutional right to have the jury consider all relevant mitigating evidence under the Eighth Amendment before imposing a death sentence. 529 U.S. at 399. As that case makes clear, under *Strickland* counsel's error must deprive the defendant of a constitutional right pertaining to a fair criminal trial or sentencing proceeding, not a subsequent civil or

administrative proceeding. *Id. See also Lockhart v. Fretwell*, 506 U.S. 364 (1993).[14]

In this case Padilla was provided competent counsel as required under the Sixth Amendment who ensured that Padilla was fully aware of the rights he was waiving by entering a guilty plea and the direct consequences of that plea. To further safeguard Padilla's rights the trial court engaged in a full *Boykin* colloquy to again ensure Padilla's full understanding of the direct consequences that would flow from his guilty plea. The law, unless dramatically expanded by this Court, entitles Padilla to nothing more. Because counsel's alleged misadvice did not render the proceeding fundamentally unfair nor deprive Padilla of any right to which he was entitled, the prejudice prong of *Strickland* and *Hill* was not met.

That Padilla may have irrationally demanded trial but for the alleged misadvice given by his counsel is unimportant. To establish prejudice sufficient to justify relief, Padilla's decision to insist on going to trial must be rational and objectively reasonable. Further, because it would have been unreasonable to demand trial given the circumstances of this case, Padilla was not deprived of any substantive or

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[14] While the holding in *Williams v. Taylor*, 529 U.S. 362 (2000) limited *Lockhart*, both cases stand for the proposition that *Strickland* error must deprive a defendant of a constitutional right pertaining to a fair criminal trial or sentencing, rather than a subsequent civil or administrative proceeding.

procedural right that would have fundamentally affected the overall fairness of the criminal proceeding. Because the performance of Padilla's trial counsel did not affect the fundamental fairness of the criminal proceeding and because it is evident that Padilla's guilty plea was voluntary, this Court should uphold the judgment denying Padilla post-conviction relief regardless of how this Court decides the ultimate fate of the collateral consequences doctrine or the impact misadvice may have on that doctrine.

CONCLUSION

WHEREFORE, the judgment of the Supreme Court of Kentucky should be affirmed.

Respectfully submitted,

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REPLY BRIEF

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IN THE
Supreme Court of the United States

JOSE PADILLA,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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REPLY BRIEF OF PETITIONER

Respondent cannot defend the Kentucky collateral-consequences rule. *Strickland v. Washington*, 466 U.S. 668 (1984), forbids *per se* rules and commands a contextual inquiry into the reasonableness of attorney conduct under prevailing professional norms. The Kentucky rule jettisons professional standards altogether in favor of a *per se* rule that it is always reasonable for counsel to disregard the "collateral" consequences of conviction. A lawyer does not render effective assistance by turning a blind eye to the client's most important interests in contravention of professional standards, conducting a partial investigation of the facts and law, and negotiating a catastrophic guilty plea that an informed client never would have accepted.

Respondent fares no better in arguing that misadvice about immigration consequences can never constitute ineffective assistance of counsel. As *amicus curiae* the United States recognizes, if defense counsel assumes the duty to advise a defendant regarding the deportation consequences of conviction, she must do so competently. Virtually every court has long applied *Strickland* to misadvice claims, without ill effects.

Finally, this Court should ignore Respondent's invitation to decide whether the record conclusively refutes Padilla's claim of prejudice. That state-law issue is outside the question presented, not passed on or presented below, waived, and beyond this Court's power to decide. Regardless, Respondent is wrong on the merits. This Court should reject the Kentucky rule and remand for further proceedings.

I. THE COLLATERAL-CONSEQUENCES RULE IS INCOMPATIBLE WITH THE SIXTH AMENDMENT.

1. Respondent argues that the Sixth Amendment duties of defense counsel with regard to guilty pleas parallel those of courts under *Brady v. United States*, 397 U.S. 742 (1970). Thus, defense counsel's advice regarding a guilty plea is not ineffective unless it impairs the defendant's understanding of his constitutional rights, the charges against him, or the direct consequences of his plea. Resp. Br. 13-14. Respondent misconceives both *Brady* and the constitutional rights at stake.

Brady is a due process case regarding constraints on the exercise of state power. A guilty plea is not just a confession but "a conviction; nothing remains but to give judgment and determine punishment." *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). The state may not exercise the power of conviction, judgment, and punishment without canvassing on the record the voluntariness of the plea and the defendant's understanding of his constitutional rights, the charges brought against him, and the consequences that the court may impose in sentencing for the offense. *Id.* at 242-44; *Brady*, 397 U.S. at 755. But *Brady*'s narrow due process inquiry presumes that the guilty plea is "made by competent defendants with adequate advice of counsel," *id.* at 758, for "intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney." *Id.* at 748 n.6; *Mabry v. Johnson*, 467 U.S. 504, 508 (1984) ("a voluntary and intelligent plea of guilty made by an accused person, *who has been advised by*

competent counsel, may not be collaterally attacked" (emphasis added)).

The Due Process Clause and the Sixth Amendment are independent sources of constitutional rights for defendants who plead guilty. *United States v. Broce*, 488 U.S. 563, 574 (1989). The standards are different because the duties and function of courts and defense counsel are different. Unlike a passive and neutral court, defense counsel must "make an independent examination of the facts, circumstances, pleadings and laws involved and then ... offer his informed opinion as to what plea should be entered," *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948) (Black, J., plurality), advising the defendant of "the advantages and disadvantages of a plea agreement." *Libretti v. United States*, 516 U.S. 29, 50-51 (1995). Whereas the court accepting a guilty plea must apprise the defendant of *what* rights he waives and *what* consequences it may impose, defense counsel has the very different function of investigating the relevant factors and advising the defendant *whether* to plead guilty. Accordingly, even apart from the due process voluntariness standard of *Brady*, a defendant may attack a guilty plea if his attorney's representation was objectively unreasonable and prejudicial under *Strickland*. *Hill v. Lockhart*, 474 U.S. 52, 57 (1985); Br. Legal Ethics Professors *et al.* ("Professors' Br.") 20-23.[1] Thus, *Brady* permits a court accepting a guilty plea to presume the adequacy of counsel's investigation and

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[1] Contrary to Respondent's claims, Resp. Br. 22, applying *Strickland* here would have no effect on the duties of courts.

advice in accepting a guilty plea, but *Strickland* and *Hill* ensure that the defendant has a remedy when that investigation or advice turns out to be defective.

2. The United States recognizes this distinction, Br. for United States ("U.S. Br.") 12-13, but asks this Court to embrace a new principle of "Sixth Amendment jeopardy" to limit defense counsel duties. *Id.* at 15 n.4. It contends that a lawyer satisfies constitutional standards by *partial* investigation and disclosure of the disadvantages and advantages of pleading guilty. According to the United States, defense counsel need only advise the defendant of "the facts and law necessary to enable the defendant to evaluate the plea's strategic implications for the defendant's *interests within the criminal case*," which it defines as only criminal liability and punishment. *Id.* at 11 (emphasis added). Petitioner does not agree with the crabbed view that criminal liability and punishment are the only "interests" of the defendant at stake "within the criminal case"; immigration status and consequences are inextricably intertwined with the defense of criminal charges against an immigrant defendant, and only in the criminal case can a defendant charged with an aggravated felony effectively defend his right to remain in this country. *See infra* pp. 11-13. Regardless, this position is unsound.

First, contrary to the United States' claim, U.S. Br. 9, that distinction is not founded in the Constitution's text. The Sixth Amendment states only that "[i]n all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The only textual requirement is that the assistance be rendered in

defending the criminal prosecution (such as advising on a guilty plea). Once the right attaches, the Sixth Amendment does not "specify[] particular requirements of effective assistance" or limit the type of assistance to which the accused is entitled. *Strickland*, 466 U.S. at 688; Professors' Br. 7-8. Moreover, Padilla did not allege prejudice in a civil proceeding. Critically, he alleged prejudice in the criminal prosecution itself (namely, the forfeiture of a jury trial on the criminal charges because of his attorney's incompetent advice to plead guilty). JA 72-73. That satisfies the prejudice prong of *Strickland*. *Hill*, 474 U.S. at 56-57; *infra* pp. 7-8.

Second, the collateral-consequences rule is irreconcilable with *Hill* and *Strickland*. *Hill* embraced this rule in defining the duties of courts in accepting guilty pleas, but held that for ineffective assistance claims the two-part *Strickland* analysis applies. *Hill*, 474 U.S. at 56-57. Respondent and the United States counter that *Hill* did not foreclose adoption of the collateral-consequences rule under the first *Strickland* prong. Resp. Br. 23-24; U.S. Br. 13 n.3. That is not so, for the collateral-consequences rule is the antithesis of *Strickland*.

Strickland forbids "mechanical rules" of attorney duty because they cannot "take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." 466 U.S. at 688-89, 696. Instead, the Sixth Amendment "relies ... on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill [its] role in the adversary process ...." *Id.* at 688. Accordingly, "[i]n *any case* presenting

an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable *considering all the circumstances.*" *Id.* (emphasis added).

Respondent and the United States advocate nothing less than abrogating *Strickland* in this context. They acknowledge (Resp. Br. 24-27; U.S. Br. 14) that, under prevailing professional standards, defense counsel must investigate and advise the client regarding collateral consequences (including deportation) that are material to the plea decision, and perform these tasks competently. Petr. Br. 36-42; Br. of American Bar Ass'n ("ABA Br.") 5-25; Br. of National Association of Criminal Defense Lawyers *et al.* ("NACDL Br.") 10-18. They instead invoke the undisputed propositions that the Sixth Amendment does not "constitutionalize particular standards of professional conduct," *Nix v. Whiteside*, 475 U.S. 157, 165 (1986), and that professional standards are "only guides" in a reasonableness inquiry, *Strickland*, 466 U.S. at 688, and not the equivalent of "binding statutory text," *Rompilla v. Beard*, 545 U.S. 374, 400 (2005) (Kennedy, J., dissenting). *See* Resp. Br. 24-26; U.S. Br. 14. But Padilla has disclaimed any *per se* rule in his favor, and seeks only the application of professional standards as guides for determining whether his attorney's performance was objectively unreasonable. Petr. Br. 42-43.

Respondent and the United States do not urge using professional standards as guides in conformity with *Strickland*. Rather, they ask this Court to discard them altogether in favor of a *per se* rule that defense counsel may always disregard collateral consequences in advising on guilty pleas. In short,

they advocate abandoning *Strickland*'s core holding that the Sixth Amendment "relies ... on the legal profession's maintenance of standards," and that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." 466 U.S. at 688; *Knowles v. Mirzayance*, 129 S. Ct. 1411, 1420 (2009).

Respondent's invocation (Resp. Br. 25-26) of Justice Kennedy's dissent in *Rompilla* is misplaced. It was common ground among the *Rompilla* majority and dissenters that ABA standards are guides for determining reasonableness under the Sixth Amendment. *Compare Rompilla*, 545 U.S. at 380-81, 389-90, *with id.* at 399-401 (Kennedy, J., dissenting). The dissent questioned only the majority's fidelity to that principle and regarded the attorneys' performance in that case as objectively reasonable. *Id.* at 404-05. The *Rompilla* dissent, which vigorously defends *Strickland*'s rejection of *per se* rules, *id.* at 400, does not support a *per se* rule undermining *Strickland*.

Moreover, the United States and Respondent miscite *Strickland* for the proposition that counsel's assistance is constitutionally ineffective only if it undermines the reliability of the guilt determination or sentence. Resp. Br. 12-13; U.S. Br. 10. But that is the touchstone only when the allegation is attorney error in conducting the defense at trial and sentencing. *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000). That showing need not be made when the error "led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself." *Id.* It is enough to show that deficient attorney performance caused the forfeiture of a

proceeding within the criminal prosecution to which the defendant was entitled. *Id.* at 484. *Flores-Ortega* cited *Hill* for the proposition that deficient advice leading to the entry of a guilty plea is prejudicial simply if it caused the defendant to forfeit a jury trial: "the decision whether to plead guilty (*i.e.*, waive trial) rested with the defendant and, like this case, counsel's advice in *Hill* might have caused the defendant to forfeit a judicial proceeding to which he was entitled." *Id.* at 485. The defendant does not need to show that it would have likely prevailed in the forfeited proceeding, or even the issues that he would have raised. *Id.* at 486 (holding that a defendant deprived of an appeal by attorney incompetence is prejudiced if "but for counsel's deficient conduct, he would have appealed").

Third, and most fundamentally, the position of the United States and Respondent cannot be reconciled with defense counsel's core function. "Counsel's concern is the faithful representation of the interest of his client." *Tollett v. Henderson*, 411 U.S. 258, 268 (1973). "The impact of deportation upon the life of an alien is often as great, if not greater than, the imposition of a criminal sentence." *Bridges v. Wixon*, 326 U.S. 135, 164 (1945); Br. of Asian American Justice Center *et al.* ("AAJC Br.") 14-27. Typically "'an alien charged with a crime . . . would factor the immigration consequences of conviction in deciding whether to plead or proceed to trial.'" *INS v. St. Cyr*, 533 U.S. 289, 322 (2001) (quoting *Magana-Pizano v. INS*, 200 F.3d 603, 612 (9th Cir. 1999)). An attorney does not render effective assistance under the Sixth Amendment by (1) disregarding paramount interests of the client

that cannot be protected except in the criminal proceeding; (2) disregarding established ethical duties to ensure competent representation, inform the client of the legal risks, and ascertain and pursue the informed client's objectives; and (3) negotiating a plea deal that visits catastrophe upon the client and that the client would never have accepted if fully informed. Petr. Br. 31-35. Defense counsel "cannot ignore the practical implications of a legal proceeding for the client." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1041 (1991) (Kennedy, J., plurality).

Moreover, the position of Respondent and the United States rests on a false premise. Counsel is not limited to advising on a subset of issues relevant to the plea – *i.e.*, facts and law relating to criminal liability and punishment, U.S. Br. 11 – while leaving the client to evaluate other consequences of conviction on his own or with the help of another lawyer. As the United States elsewhere acknowledges (U.S. Br. 21), counsel has a duty, *after* investigating the facts and law, to "offer his informed opinion as to what plea should be entered." *Von Moltke*, 332 U.S. at 721; *see also Hill*, 474 U.S. at 59; *Williams v. Kaiser*, 323 U.S. 471, 475 (1945). This duty reflects the recognition that the defendant needs the expertise of a lawyer not merely to *identify* the advantages and disadvantages of a plea, but also to *balance* them. It serves to protect the defendant – often uneducated, mentally limited, or intimidated – from becoming the "victim of overzealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment." *Williams*, 323 U.S. at 476.

Defense counsel cannot perform this core Sixth Amendment function by viewing criminal

consequences in isolation. Counsel examining only criminal punishment might rationally recommend a plea deal for probation attached to a suspended sentence, even where the defendant has a strong defense, to spare the defendant and his family the expense and pain of trial. But no lawyer would recommend such a plea if it will result in life-shattering deportation. AAJC Br. 14-18 (giving examples of unknowing probation pleas to deportable offenses).[2] Counsel cannot render effective assistance wearing blinders, and the Sixth Amendment does not permit a rule that distorts the defense function.

Moreover, Respondent and the United States do not suggest that many immigrant defendants can afford a second lawyer to advise on the immigration consequences of conviction, or can navigate the federal immigration laws on their own in order to identify and mitigate those consequences in the criminal prosecution. The collateral-consequences rule is a prescription for guilty pleas entered out of ignorance, which conflicts with the Sixth Amendment.[3]

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[2] *Cf. Alabama v. Shelton*, 535 U.S. 654, 673-74 (2002) (probation with suspended sentences triggers Sixth Amendment right to counsel). Suspended sentences can make a conviction the basis of deportation. *See* 8 U.S.C. § 1101(a)(48)(B) (references to a term of imprisonment in defining a deportable offense includes suspended sentences); *id.* § 1101(a)(43)(F) & (G) (aggravated felonies defined based on sentences to a specified term of imprisonment); *id.* § 1227(a)(2)(A)(i) & (iii) (defining aggravated felonies and certain crimes of moral turpitude as deportable offenses).

[3] The United States claims that immigrant defendants know the immigration consequences of conviction and therefore are

(continued...)

3. The line that the United States and Respondent would draw between criminal and collateral consequences of conviction (particularly immigration consequences) is fictional. As Petitioner and *amici* show, immigration status and consequences affect every stage of the criminal process. Petr. Br. 44-50; NACDL Br. 4-9; ABA Br. 15-25. Neither Respondent nor the United States confronts this analysis. Investigation of immigration consequences is often strategically necessary to reduce the defendant's *criminal* liability or punishment. Petr. Br. 44-49; AAJC Br. 25-27 (detailing examples where defense counsel successfully negotiated pleas to lesser offenses or obtained lower sentences to avoid deportation); ABA Br. 22-25 (same). Similarly, it may be in the client's interest for defense counsel to negotiate a plea to a greater offense or a higher sentence in order to avoid dramatically adverse immigration consequences. Petr. Br. 47. Finally, awareness of immigration consequences might cause defense counsel to avoid strategies that are generally thought to be beneficial to defendants. For example, even where the prosecutor would agree to (or the court would impose)

(...continued)

inherently not prejudiced. U.S. Br. 17. But many immigrants have no idea, and many more will not understand which offenses are aggravated felonies or otherwise deportable, much less strategies for avoiding mandatory deportation. That is why "competent defense counsel" are expected to address immigration consequences. *St. Cyr*, 533 U.S. at 322-23 & n.50. Equally unfounded is Respondent's claim that "[t]he client and the lawyer both know that the scope of representation" in the criminal prosecution "is limited to the criminal charge." Resp. Br. 9. The Model Rules presume the opposite. Petr. Br. 36-38.

a sentence of less than a year, defense counsel may seek an *increased* sentence of a year and a day to allow eligibility for early release for good behavior. *See* 18 U.S.C. § 3624(b). Defense counsel cannot justify that strategy if a one-year term of imprisonment is the trigger for mandatory deportation. Petr. Br. 48.

Indeed, the United States concedes that defense counsel may have a Sixth Amendment duty to investigate deportation consequences to advocate a reduced sentence. U.S. Br. 16 n.5. But because a predictive judgment about the likely sentence is necessary to assess the plea's advantages, this means counsel must account for deportation consequences in advising the client to plead guilty. The United States further concedes that the Sixth Amendment requires defense counsel to evaluate deportation consequences if the government offers a reduced sentence, probation, or supervised release in return for a stipulation to deportation. *Id.* at 15-16. But plea bargaining is a two-way street, and the defense attorney cannot passively await government proposals. If such terms are potentially advantageous in resolving the criminal charges, defense counsel has a Sixth Amendment duty to investigate and advise the client of alternatives, and (with the client's approval) to pursue them with the prosecution. Moreover, the United States acknowledges that federal prosecutors may, at any time before entry of the guilty plea, make a motion for a district court to order judicial removal upon conviction. 8 U.S.C. § 1228(c)(1)-(2). These concessions expose the error of the Kentucky rule: collateral consequences cannot be categorically excluded from the Sixth Amendment.

Guilty pleas are the backbone of the criminal justice system, but only because the Sixth Amendment ensures that a defendant does not make this decision "of signal significance in a criminal proceeding" without competent assistance of counsel. *Florida v. Nixon*, 543 U.S. 175, 187 (2004). For guilty pleas, as for other aspects of criminal defense, what constitutes effective assistance is too variegated for mechanical rules. *Strickland*'s case-by-case approach preserves core Sixth Amendment values, even as professional standards or substantive laws evolve, such as the sea change in federal immigration laws, or the recent shift to increasingly severe collateral consequences for criminal offenses.[4]

4. The United States and Respondent both raise practical concerns with applying *Strickland* in this context, but such concerns have no place in Sixth Amendment analysis. *Kimmelman v. Morrison*, 477 U.S. 365, 377-79 (1986); Petr. Br. 49-50. Regardless, they overstate the concerns.

First, *Strickland* adds no burdens upon defense counsel that they do not currently have under ethical rules or professional standards. ABA Br. 5-25; NACDL Br. 10-17.

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[4] *See, e.g.*, *Sex Laws: Unjust and Ineffective*, The Economist, Aug. 8, 2009, at 21-23 (explaining that some states require lifetime registration laws for even minor, non-violent sexual offenses); Human Rights Watch, *No Easy Answers, Sex Offender Registration Laws in the US*, Sept. 2007, *available at* http://www.hrw.org/en/reports/2007/09/11/no-easy-answers.

Second, collateral consequences are limited to legal disabilities that follow upon conviction, ABA Br. 8 n.7, and do not extend to "every possible aspect of the client's future," Resp. Br. 9.

Third, while federal and state laws impose many collateral consequences, nothing in *Strickland* requires defense counsel to develop encyclopedic forcknowledge of collateral consequences or immigration law. Most collateral consequences fall into certain categories: (1) immigration consequences; (2) incarceration-related consequences, like parole eligibility or good-time credits; (3) consequences related to government licensure, procurement, employment, privileges, program participation, and benefits; (4) consequences related to highly regulated or high-risk private employment; and (5) consequences resulting from conviction of violent, sexual, fraud-related, or drug-related offenses. [5] Counsel are reasonably expected to be aware of the most deleterious collateral consequences, and also of the types of offenses and defendants for which other collateral consequences might be material. If necessary, inquiry into specific collateral consequences entails straightforward legal research. Professors' Br. 33-34. Moreover, new legislative initiatives are making compilations of collateral consequences systematically available, as well as requiring that notice of criminal charges include

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[5] *See* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697, 738 (2002); ABA, Internal Exile: Collateral Consequences of Conviction In Federal Laws and Regulations (2009), *available at* http://www.abanet.org/cecs/internalexile.pdf.

possible collateral consequences, which highlights their interrelationship with the criminal defense function.[6] It demeans the American bar to say that defense lawyers cannot be expected to identify legal problems and research the law.

The ABA and NACDL *amici* briefs refute the claim that their members will be overwhelmed if held to *Strickland* standards. There are broadly available resources to help lawyers investigate immigration consequences and develop strategies within the criminal case to mitigate them, and competent lawyers are doing so. Criminal lawyers are not expected to master immigration law, but can resolve most problems with recourse to practice aids or free consultation services. ABA Br. 26-28; NACDL Br. 22-39. While some immigration issues may be difficult, most (such as identifying the drug-trafficking offense here as an aggravated felony) are not. There is no reason to shape constitutional law to accommodate the practices of the incompetent. *Tollett*, 411 U.S. at 268.

5. Respondent's last claim is that this Court should presume that violations of professional standards are so rampant that applying *Strickland*

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[6] *See* Nat'l Conf. of Comm'rs on Uniform State Laws, Uniform Collateral Consequences of Conviction Act (approved Aug. 2009), http://www.law.upenn.edu/bll/archives/ulc/ucsada/2009am_approved.htm (last visited Sept. 7, 2009); Court Security Improvement Act of 2007, Pub. L. No. 110-177, 121 Stat. 2534, 2543-44 (2008) (Director of the National Institute of Justice to identify collateral consequences in the constitutions, codes and administrative rules of the fifty states).

here would unsettle many criminal convictions. This argument ignores that the *Strickland* standard itself "serve[s] the fundamental interest in the finality of guilty pleas." *Hill*, 474 U.S. at 58. *United States v. Timmreck*, 441 U.S. 780 (1979), cited by Respondent, Resp. Br. 19, is not to the contrary. *Timmreck* simply refused to permit a collateral attack on a guilty plea where there was no constitutional error, only violations of the formal requirements of Federal Rule of Criminal Procedure 11. 441 U.S. at 783-84. It never questioned the adequacy of *Strickland* as a safeguard of finality. Indeed, ineffective-assistance claims rarely succeed. *See* Victor E. Flango, Habeas Corpus in State and Federal Courts 62 tbl.17 (Nat'l Ctr. for State Cts. 1994), *available at* http://contentdm.ncsconline.org/cgibin/showfile.exe?CISOROOT=/criminal&CISOPTR=0 (finding in an empirical study, that only 8% of state petitions and less than 1% of federal petitions claiming ineffective assistance of counsel were granted).

Few petitioners will satisfy *Strickland*'s first prong. "Most guilty pleas would be unaffected because lawyers often do discuss collateral consequences with their clients or there are no significant collateral consequences." Chin & Holmes, *supra* note 5, at 737. Under the *Flores-Ortega* framework, a failure to advise a defendant about collateral consequences is objectively unreasonable only if the defendant can prove at an evidentiary hearing that, under the totality of the circumstances, (1) counsel knew or should have known that "a rational defendant" would consider the collateral consequences material to the plea, *or* (2) "this particular defendant reasonably demonstrated to

counsel" that the collateral consequences would be a material factor in his plea decision. 528 U.S. at 480.

Moreover, incompetency is hard to prove. *Strickland* analysis is "highly deferential," for "[t]he Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 6, 8 (2003). The claim that *Strickland* standards would require a "dream team" of specialist lawyers is false. *Strickland* requires only that the defense lawyer act reasonably under professional norms. The complexity or obscurity of an immigration-law issue would factor into the objective reasonableness analysis.

Lastly, *Strickland*'s prejudice prong protects finality. *Hill*, 474 U.S. at 58. Many collateral consequences are too unimportant to cause prejudice, and few defendants who were spared significant incarceration by a plea bargain will succeed in proving that they would have gone to trial if properly advised of collateral consequences. Chin & Holmes, *supra* note 5, at 737; *see, e.g., Blackwell v. State*, 736 A.2d 971, 973 (Del. 1999) (inmate subject to a fifteen-year imprisonment was not prejudiced and therefore could not withdraw his guilty plea because of ignorance of a two-year driver's license suspension). The only defendants likely to do so are those (like Padilla) for whom the collateral consequence is devastating and substantially disproportionate to the benefits of the plea bargain. Moreover, only lawfully admitted immigrants can plausibly allege prejudice from conviction of a deportable offense. Illegal aliens generally cannot, absent a colorable pending or future claim to legal immigration status, because

illegal presence is grounds for removal independent of the conviction. 8 U.S.C. § 1227(a)(1).

The United States agrees that widespread vacaturs of convictions are not a concern because few defendants can show prejudice. *See* U.S. Br. 16-17. Rather, it worries about "an influx of challenges to long-final [claims]" and the possibility of stale claims. *Id.* at 19. But state and federal statutes of limitation and rules of exhaustion and default are ample protections. Moreover, habeas challenges to guilty pleas are relatively uncommon, *see* Professors' Br. 28 n.17, no doubt in part because pleas generally benefit the defendant. Few will choose to expose themselves to increased jeopardy by undoing the plea and going to trial. Neither respondent nor the United States show that the four jurisdictions that reject the collateral-consequences rule [7] are overrun with attacks on guilty pleas. Moreover, there has been no flood of petitions in the vast majority of jurisdictions that apply *Strickland* to misadvice claims. Finality concerns should not weigh heavily in this case.

6. This Court also need decide no more than whether *Strickland* applies to deportation-advice claims. This is not because there are no other collateral consequences of great significance to other

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[7] *See State v. Paredez*, 101 P.3d 799, 804-05 (N.M. 2004) (finding duty to advise based on ABA standards); *In re Resendiz*, 19 P.3d 1171, 1179-88 (Cal. 2001) (rejecting collateral consequences doctrine as inappropriate to Sixth Amendment analysis and holding that misadvice was objectively unreasonable); *People v. Pozo*, 746 P.2d 523, 525-28 (Colo. 1987); *State v. Creary*, No. 82767, 2004 WL 351878, at *2 (Ohio Ct. App. Feb. 26, 2004).

defendants, but because this Court need only decide the issue as presented in this case. Deportation is different from most collateral consequences because it is effectively mandatory;[8] is historically closely linked with the criminal case; is comparable in severity to criminal sanctions and in many cases may exceed them; affects criminal strategy in every prosecution phase; and subjects the defendant to more onerous conditions of confinement and continuous custody after completion of the criminal sentence. Petr. Br. 50-55.

II. *STRICKLAND* GOVERNS MISADVICE CLAIMS.

Even if it were *per se* reasonable for defense counsel to disregard collateral consequences in giving guilty-plea advice, courts have almost uniformly ruled that *misadvice* can constitute ineffective assistance if unreasonable and prejudicial under *Strickland*. Petr. Br. 55 & n.16. As the United States argues, if defense counsel affirmatively undertakes to advise the defendant of such

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[8] Respondent states that "Padilla concedes on page 33 of his brief that even an aggravated felon may sometimes avoid deportation." Resp. Br. 38. Padilla actually pointed out that deportation can be avoided only in the rarest circumstance. Petr. Br. 33 (citing Norton Tooby & Joseph Rollin, *Criminal Defense of Immigrants* § 2.15 (4th ed. 2007)); *see also* AAJC Br. 7 n.9 (explaining "extraordinary circumstances" where a person convicted of an aggravated felony might gain the rarely granted relief of a temporary reprieve from deportation if she can prove she will be subject to torture if deported). Nor has Padilla "avoid[ed] deportation," Resp. Br. 38; his removal proceeding is stayed pending the outcome of this case.

consequences, "counsel has a duty to ensure that her advice is reasonably competent." U.S. Br. 6. "Counsel who gives erroneous advice to a client which influences a felony conviction is worse than no lawyer at all. Common sense dictates that such deficient lawyering goes to effectiveness." Pet. App. 26 (Cunningham, J., dissenting).

Respondent attacks this line of cases as irrational and lacking "explicit, detailed reasoning." Resp. Br. 31, 35. But the decisions simply apply this Court's holding in *Hill* that the two-part *Strickland* test governs attorney misadvice on a collateral consequence (in *Hill*, parole eligibility). Applying the rule established by this Court is not irrational; the only doctrinal irrationality is the unexamined importation of the *Brady* standard into the Sixth Amendment context (an error Respondent repeats, Resp. Br. 28-29). Petr. Br. 26-30. Moreover, a number of decisions set forth the inducement rationale amplified in the United States' and Padilla's briefs. Petr. Br. 58; *see, e.g.*, *Strader v. Garrison*, 611 F.2d 61, 65 (4th Cir. 1979); *Mott v. State*, 407 N.W.2d 581, 583-84 (Iowa 1987); *People v. Correa*, 485 N.E.2d 307, 310 (Ill. 1985).

As the United States explains, the ultimate decision to plead guilty belongs to the defendant. U.S. Br. 6 (citing *Nixon*, 543 U.S. at 187). Even if *arguendo* the attorney has no duty to investigate and advise about collateral consequences, an attorney who steps forward to do so and misrepresents material facts or law skews the defendant's decision to plead guilty. If the attorney's advice can potentially induce the defendant to enter a guilty plea he would not otherwise enter, then the attorney

has a Sixth Amendment duty to deliver competent advice. An unreasonable misrepresentation that induces a prejudicial guilty plea – *i.e.*, prejudice in the criminal prosecution, not in a separate civil proceeding – is ineffective assistance of counsel. U.S. Br. 22-24; Petr. Br. 57-59.

Material misrepresentation that induces a prejudicial guilty plea – whether by the court, the prosecutor, or the defense attorney – has long been a basis to attack the guilty plea, even if there was no duty to speak in the first place. *See Brady*, 397 U.S. at 755; *Santobello v. New York*, 404 U.S. 257, 262 (1971); *Libretti*, 516 U.S. at 50-51; see also *Denedo v. United States*, 66 M.J. 114, 129-30 (C.A.A.F. 2008) (remanding for consideration of whether misadvice about deportation consequences warranted coram nobis relief), *aff'd on jurisdictional grounds*, 129 S. Ct. 2213 (2009). As the D.C. Circuit stated in holding that a guilty plea could be withdrawn based on the prosecutor's negligent misrepresentation of the deportation consequences of a plea:

> Although it may be permissible for prosecutors to discuss deportation consequences with defendants when their understanding of the law is accurate, *see Bordenkircher v. Hayes*, 434 U.S. 357 (1978), the practice cannot be tolerated when the prosecution's advice is erroneous, no matter how well intended. The government may not be required to inform defendants of collateral plea consequences such as deportation, but it does have an obligation not to mislead them.

United States v. Russell, 686 F.2d 35, 41 (D.C. Cir. 1982).

That principle is well founded in law. A contract (including a plea agreement) may be voided at the election of the aggrieved party for material misrepresentation that induces the contract, regardless of whether the misrepresentation is intentional or negligent. *See* Restatement (Second) of Contracts §§ 159-167 (1981). Here, even though the defense attorney is not the agent of the state, the State is responsible for the attorney's performance, *Kimmelman*, 477 U.S. at 379, so attorney misrepresentation can be ineffective assistance. By contrast, under Respondent's conception, defense counsel (perhaps eager to work on a more profitable case) could even intentionally lie about collateral consequences to induce a plea, with impunity under the Sixth Amendment.

Respondent claims that any legal distinction between omission and commission is arbitrary. But Respondent supports that claim only by examples from contract or tort law pertaining to breach of an *existing* legal duty. Resp. Br. 30-31. By contrast, the law has always drawn a distinction between omission and commission in determining *when a duty arises*. Thus, one may have no duty to speak, but the action of speaking gives rise to a duty of care. *United States v. Neustadt*, 366 U.S. 696, 706 (1961) (negligent misrepresentations violate "the duty to use due care *in obtaining and communicating information* upon which that party may reasonably be expected to rely in the conduct of his economic affairs") (emphasis added). So too here.

Finally, Respondent does not claim that any practical burdens flow from retaining the current majority rule that misadvice claims are cognizable under *Strickland*. Simply asking an attorney to refrain from giving advice that he is incompetent to deliver does not burden the attorney. Furthermore, as to finality, there has been no deluge of petitions in the many jurisdictions that have long permitted misadvice claims. Finality concerns are not implicated where the legal rule has been in place for decades and "there is no clear evidence that this particular classification of habeas proceedings has burdened the dockets of the ... courts." *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 24 (1992) (Kennedy, J., dissenting). Thus, this Court should hold that misadvice claims are subject to *Strickland* regardless of its position on the collateral-consequences rule.

III. THE PREJUDICE QUESTION IS NOT PROPERLY DECIDED BY THIS COURT.

Respondent invites this Court to decide that, in light of the record, Padilla cannot show prejudice because there is no reasonable probability he would have gone to trial. Resp. Br. 41-45. That invitation is improper.

First, this Court does not decide issues outside the questions presented and not addressed by the court below. *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Moreover, Respondent did not even *present* this prejudice argument to the Kentucky Supreme Court; it only made the mistaken (now abandoned) claim that Padilla was deportable as an illegal alien. Appellant Br. 5 (Ky. S. Ct. Nov. 15, 2006); JA 91-92.

Second, Respondent waived this argument by not including it in its brief in opposition to Padilla's petition for certiorari. *See* Sup. Ct. R. 15.2; *Aetna Health Inc. v. Davila*, 542 U.S. 200, 212 n.2 (2004); *S. Cent. Bell Tel. Co. v. Ala.*, 526 U.S. 160, 170-71 (1999).

Third, and most fundamentally, this case arises from a *state court* post-conviction petition, and the question Respondent invites the court to decide is one of state law for a state court to decide on remand. Here, there is no dispute that Padilla alleged both elements of a *Strickland* claim, including the allegation missing in *Hill v. Lockhart* that he would have gone to trial if properly advised. *See* 474 U.S. at 60.[9] Respondent makes the different contention that, given the record evidence, Padilla could not ultimately show a reasonable probability that he would have gone to trial. Resp. Br. 42-43; U.S. Br. 29-30. Even where the substantive law is federal, however, the sufficiency of a *state* post-conviction petition in light of record evidence is a question of *state procedural law*. In Kentucky, a post-conviction petition may not be denied without an evidentiary hearing if it alleges a "material issue of fact that

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[9] In *Hill*, the question of federal law presented was whether the defendant's allegations in a *federal* habeas petition entitled him to an evidentiary hearing. Brief of Petitioner, *Hill v. Lockhart*, No. 84-1103, 1985 WL 669995 (U.S. filed May 30, 1985). In *Hill*, this Court found the petition defective because his allegations did not "satisfy the *Strickland v. Washington* requirement of 'prejudice'": *i.e.*, "Petitioner did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial." 474 U.S. at 60.

cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by an examination of the record." *Fraser v. Commonwealth*, 59 S.W.3d 448, 452-53 (Ky. 2001). This Court lacks the power to decide this state-law question. *Murdock v. City of Memphis*, 87 U.S. 590, 626 (1875).

Regardless, as the Kentucky Court of Appeals held, Pet. App. 36, Respondent is wrong on the merits. As an initial matter, Padilla does not bear the burden of stating in his petition the defenses he would have raised at trial. A *pro se* petitioner is not expected to show that his trial defenses "had merit before any advocate has ever reviewed the record." *Flores-Ortega*, 528 U.S. at 486 (federal petition alleging prejudicial denial of appeal); *Fraser*, 59 S.W.3d at 453 ("If an evidentiary hearing is required, counsel must be appointed to represent the movant . . . .").

Furthermore, a reviewing court cannot presume that a jury would accept beyond a reasonable doubt the untested prosecution evidence from a *suppression* hearing. *See* Resp. Br. 42; U.S. Br. 30. The only issue at a suppression hearing is whether the evidence was the product of an unlawful search. Order Denying Def's Mot. to Suppress, R. 32-34. The prosecution's evidence has not been subjected to adversarial testing as to its truth, and the defendant has not had the opportunity to present his own evidence on the charges.

On the merits, material issues of fact exist as to prejudice. The felony drug-trafficking offense at issue requires proof that the defendant "knowingly and unlawfully traffics in marijuana." Ky. Rev. Stat.

Ann. 218A.1421 (2002). The Commonwealth indicted Padilla on the theory that "he knowingly and unlawfully trafficked in marijuana, by possessing with the intent to sell or transfer approximately 1033 pounds of marijuana in a semi-tractor trailer at the weigh station on I-65, Elizabethtown, Kentucky." JA 48-49.

Mr. Padilla had at least two viable defenses to the felony indictment. First, he had a triable case that he did not know that he was transporting marijuana. Kentucky law defines "knowingly" to require actual knowledge that "his conduct is of that nature or that the circumstance exists," Ky. Rev. Stat. Ann. 501.020(2) (2002), which is stricter than the Model Penal Code requirement of actual knowledge and does not include willful blindness. *Martin v. Commonwealth*, 96 S.W.3d 38, 62 (Ky. 2003); *Love v. Commonwealth*, 55 S.W.3d 816, 825-26 (Ky. 2001). Padilla was a commercial truck driver who transported twenty-three wrapped Styrofoam boxes as part of a truckload of candy boxes. R. 5, 33. Respondent's purported proof of knowledge is the arresting officer's testimony that during the search Padilla responded "maybe drugs" to a query about the boxes' contents. *Id.* at 32-33. Not only is that testimony facially ambiguous as to knowledge, but it also has not been subjected to cross-examination for veracity, accuracy of recollection, or context. Nor does the record disclose Padilla's version of events. This limited record cannot conclusively prove that a jury would have found beyond a reasonable doubt from the totality of the evidence that Padilla had actual, direct knowledge that the boxes contained marijuana.

Second, Padilla could also defend against the trafficking charge on the ground that he did not possess the mental state required by the indictment. Respondent had to prove not only that Padilla knew that his cargo was marijuana, but that he knowingly trafficked in that drug. The term "traffic" means "to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance." Ky. Rev. Stat. Ann. 218A.010(28) (2002). There was no completed transaction in this case, so Padilla was indicted on the grounds that he possessed the marijuana with the specific intent to "sell or transfer" those drugs to another. JA 48-49.

A jury could believe (or at least harbor reasonable doubt) that Padilla understood the transaction to be transporting the packages on behalf of a third party, and had no more intent to "sell" the contents of those packages than he did the candy-bar boxes that comprised the rest of his load. Even if Respondent alternatively proved that Padilla possessed marijuana with intent to "transfer" – defined as "dispos[ing] of a controlled substance to another person without consideration," Ky. Rev. Stat. Ann. 218A.010(29) (2002) – such proof would not support a trafficking conviction. *Commonwealth v. Rodefer*, 189 S.W.3d 550 (Ky. 2006) (holding that a completed transfer constitutes drug trafficking, but not possession with intent to transfer). Accordingly, Padilla could not have been found guilty of the underlying offense under the Commonwealth's theory.

Given his triable defense on these two issues, the record does not conclusively show that Padilla

cannot prove a reasonable probability that he would have gone to trial if properly advised. This standard is not, as Respondent claims, strictly objective. The assessment of trial defenses is objective, *Hill*, 474 U.S. at 59-60, but "the decision whether to plead guilty (*i.e.*, waive trial) rested with the defendant." *Flores-Ortega*, 528 U.S. at 485. Thus, the question is whether Padilla himself (if properly advised) would have decided to go to trial, in light of the objective circumstances of his trial defenses, any risks of greater criminal punishment, and the hardship of deportation to him. *Hill*, 474 U.S. at 59-60; *see United States v. Couto*, 311 F.3d 179, 182-84, 188 (2d Cir. 2002) (finding based on the totality of circumstances that the defendant would have gone to trial, even though the prosecution had a strong case with corroborative video evidence, and even though the plea deal had spared the defendant incarceration for a sentence with a maximum term of fifteen years imprisonment).

There are material issues of fact to be resolved at an evidentiary hearing under *Fraser*. Padilla's refusal to accept the plea agreement until the jury had already been seated (despite having been in pretrial custody for a year) evinces his willingness to go to trial. Moreover, the benefit Padilla derived from his plea to a partially probated maximum sentence was meager. By pleading guilty, Padilla forfeited his right to jury trial and to force the Commonwealth to prove his guilt by a reasonable doubt. He also forfeited his right to jury sentencing (and to present mitigating sentencing evidence to the jury). *See* Ky. Rev. Stat. Ann. 532.055(2) (2002). He may have received a substantially lower sentence

than ten years, perhaps the minimum of five years. In any event, he would have been parole eligible after serving 20% of his sentence. 501 Ky. Admin. Regs. 1:030 (2002). Thus, even if he had gone to trial and received the maximum sentence of ten years, he would have been eligible for parole within approximately a year from conviction (given his credit of 365 days for time served). Petr. Br. 10.

Respondent asks this Court to presume that Padilla would likely have received a substantially higher sentence if convicted at trial, but this limited record cannot conclusively show that. Padilla has not had the opportunity to submit contrary evidence, such as his mitigating evidence for the jury-sentencing phase (including cooperation with federal authorities and U.S. military service), and the relative leniency of Kentucky juries in sentencing for non-violent marijuana offenses. Certainly, a predictive judgment of the likely sentence to be imposed by a Kentucky jury (if Padilla were convicted) is for Kentucky courts, not this Court. So too is Padilla's reasonable expectation, even with a longer sentence of actual imprisonment, of imminent parole as a non-violent offender who cooperated with federal authorities and has a stable family situation.[10] Finally, Padilla, a lawful permanent resident for nearly 40 years with an American family,

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[10] *See* Kentucky Parole Board 2006 Annual Report, at 21-22, *available at* http://justice.ky.gov/NR/rdonlyres/0828EB8C-0E74-4F51-9F40-6B3BB7C1A4A4/0/WebreportforMrW.pdf (last visited Sept. 8, 2009) (vast majority of those who are considered eventually receive parole, and nearly half receive parole at their first opportunity).

would present evidence as to how deportation would devastate him and his family because of special circumstances. The barren record here does not conclusively show that it is not reasonably probable that Padilla (if properly advised) would have run the incremental risks of trial to avert this certain devastation.

CONCLUSION

This Court should reverse the judgment below.

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AMICUS CURIAE BRIEF

No. 08-651

In the Supreme Court of the United States

JOSE PADILLA, PETITIONER

v.

COMMONWEALTH OF KENTUCKY

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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QUESTIONS PRESENTED

1. Whether defense counsel, in order to provide the effective assistance guaranteed by the Sixth Amendment, has a duty to investigate and advise a non-citizen defendant whether the offense to which the defendant is pleading guilty will result in removal.

2. Whether petitioner's counsel provided ineffective assistance of counsel by affirmatively misadvising petitioner concerning the likelihood of removal upon the entry of his guilty plea.

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In the Supreme Court of the United States

No. 08-651

JOSE PADILLA, PETITIONER

v.

COMMONWEALTH OF KENTUCKY

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

INTEREST OF THE UNITED STATES

This case presents questions concerning the scope of the Sixth Amendment right to effective assistance of counsel in connection with a guilty plea—specifically, the duties of counsel when an alien defendant enters a guilty plea that may have consequences for her immigration status. Because the majority of federal criminal prosecutions are resolved by a plea of guilty, the resolution of the questions presented will have substantial implications for direct and collateral review of federal convictions.

STATEMENT

1. Petitioner, an alien, is a national of Honduras who has lived in the United States for about 40 years. Pet.

App. 19, 41-42. In 2001, law enforcement officers at a Kentucky weigh station stopped petitioner for failing to have a weight and distance number on his truck. Findings of Fact, Conclusions of Law and Order 1 (Hardin Cir. Ct. May 28, 2002) (Findings). Petitioner consented to a search of the truck, which disclosed approximately 1000 pounds of marijuana. *Id.* at 2; Pet. 2; Pet. App. 41. Petitioner was subsequently indicted by a grand jury in Hardin County, Kentucky, on charges of trafficking in more than five pounds of marijuana, possessing marijuana, possessing drug paraphernalia, and operating a truck without a weight and distance tax number. *Id.* at 20, 30. Petitioner initially pleaded not guilty, and he was released on bond. J.A. 8-9.

After his arrest, on September 20, 2001, the Immigration and Naturalization Service (INS) lodged an immigration detainer against petitioner, stating that "[i]nvestigation has been initiated to determine whether [petitioner] is subject to removal from the United States." J.A. 44-46. Petitioner's bond was revoked as a result. J.A. 43.[1]

Petitioner was provided defense counsel, who conducted discovery, J.A. 9, and moved to suppress the evidence of the marijuana and petitioner's admission to the arresting officers that he had been paid to transport the

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[1] In 1999, the INS had issued a Notice to Appear requiring petitioner to respond to allegations that he was removable because he had been convicted of an aggravated felony in 1997—namely, a California offense of receiving stolen property, see 8 U.S.C. 1101(a)(43)(G). File No. A14 575 460, Notice to Appear (Dec. 13, 1999). We are informed by the Department of Homeland Security that petitioner was not served with the order until 2004 and that he is currently seeking discretionary relief from the order under former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994). See 8 C.F.R. 1212.3(h)(2).

marijuana. J.A. 12; see Findings 1. The trial court denied the motion, finding that petitioner had validly consented to the search of his truck. J.A. 14.

Shortly thereafter, petitioner pleaded guilty to the three drug-related charges, and the remaining charge was dismissed. Pet. App. 20. The charge of trafficking in more than five pounds of marijuana, the most serious charge, was a Class C felony, punishable by a term of imprisonment of five to ten years. Ky. Rev. Stat. Ann. §§ 218A.1421(4)(a), 532.060(2)(c). Pursuant to the plea agreement, the Commonwealth agreed to recommend a sentence of five years of imprisonment followed by five years of probation. J.A. 54. On October 4, 2002, the trial court imposed the agreed sentence. J.A. 61-68.

2. In August 2004, petitioner filed a pro se collateral attack on his conviction in the Hardin County Circuit Court, claiming that his counsel had provided ineffective assistance, in violation of the Sixth Amendment, by failing to properly investigate and advise him of the potential immigration consequences of his guilty plea. J.A. 71-74. Petitioner alleged that his counsel had inaccurately advised him that he "did not have to worry about [his] immigration status since he had been in the country so long," J.A. 72, and that he would not have pleaded guilty had he been correctly advised about the removal consequences of his plea. J.A. 73.

The Hardin County Circuit Court denied the motion without an evidentiary hearing, observing that "[a] valid guilty plea does not require that a defendant be informed of every consequence" of conviction. Pet. App. 43. The court further reasoned that petitioner was aware of the possibility of removal and had discussed it with counsel, *ibid.*, and that petitioner could not claim ineffective assistance based on "a statement of opinion

[by counsel] on whether the Immigration and Naturalization Service would choose to deport [him] given his length of time in the United States." *Id.* at 44.

3. On appeal, the Kentucky Court of Appeals vacated and remanded for an evidentiary hearing. Pet. App. 29-40. The court observed that *Commonweath* v. *Fuartado*, 170 S.W.3d 384 (Ky. 2005), had "held that the validity of a defendant's guilty plea is not compromised by trial counsel's failure to render advice relating to the collateral consequences of the plea." Pet. App. 34. But the court distinguished *Fuartado* on the ground that petitioner claimed that his counsel had affirmatively provided erroneous information concerning the risk of removal. *Ibid.* Misadvice, the court concluded, could constitute ineffective assistance. *Id.* at 34-36.

Judge Henry dissented, reasoning that "the consideration of collateral consequences is outside the scope of representation required under the Sixth Amendment," Pet. App. 37, and that petitioner would be unable to demonstrate prejudice from counsel's misdavice, *id.* at 39.

4. The Commonwealth sought review in the Supreme Court of Kentucky, which reversed the court of appeals and reinstated the judgment of the trial court denying petitioner's motion for collateral relief. Pet. App. 19-24. Relying on *Fuartado*, the court concluded that "[a]s collateral consequences are outside the scope of the guarantee of the Sixth Amendment right to counsel, it follows that counsel's failure to advise [petitioner] of such collateral issue or his act of advising [petitioner] incorrectly provides no basis for relief." *Id.* at 23. The court thus rejected petitioner's argument that misadvice about removal consequences is distinguishable from failure to advise. "In neither instance is the matter re-

quired to be addressed by counsel," the court stated, "and so an attorney's failure in that regard cannot constitute ineffectiveness entitling a criminal defendant to relief under *Strickland* v. *Washington* [466 U.S. 668 (1984)]." *Ibid.*

Justices Cunningham and Schroder dissented. Pet. App. 25-27. The dissenting Justices agreed with the court that a defense lawyer has "no affirmative duty to inform his or her client" about potential immigration consequences of a plea, *id.* at 25, but believed that "[c]ounsel who gives erroneous advice to a client which influences a felony conviction is worse than no lawyer at all." *Id.* at 26. The dissenting Justices concluded that counsel's action in affirmatively providing mis-information could provide a basis for a claim of ineffective assistance if that misadvice influenced the decision to plead. *Ibid.*

SUMMARY OF ARGUMENT

An attorney's Sixth Amendment duty to render effective assistance does not require her to provide advice about the possible immigration consequences of a guilty plea. An attorney who provides such advice, however, has a duty to avoid doing so incompetently. In this case, the Supreme Court of Kentucky erred in holding that misadvice about immigration consequences can never support an ineffectiveness claim. But such a claim requires both deficient performance *and* prejudice. Because petitioner cannot establish that a rational defendant in his shoes would have gone to trial if properly advised, the judgment should be affirmed.

I. The Sixth Amendment requires counsel, in assisting a defendant to decide whether to plead guilty, to advise the defendant about relevant strategic consider-

ations within the criminal case. See *Brady* v. *United States*, 397 U.S. 742, 748 n.6 (1970). Counsel is not obligated, however, to advise a defendant about potential consequences of a conviction, including removal, that are beyond the scope of the criminal prosecution. That limitation arises from the purpose of the guarantee of effective assistance of counsel, which is to safeguard the reliability of the "adversarial testing process" by ensuring that the defendant has a fair opportunity to answer the criminal charges against her. *Strickland* v. *Washington*, 466 U.S. 668, 690 (1984). That purpose demarcates the scope and content of counsel's duties as advocating for, and advising on, the defendant's interests within the criminal case—that is, the defendant's interests, as against her prosecutorial adversary, in minimizing the jeopardy that she faces in the criminal proceeding. Counsel therefore does not perform deficiently in failing to advise her client about potential consequences of conviction, including immigration consequences, that are beyond the scope of the criminal case.

II. If counsel undertakes to advise the defendant about immigration or other consequences that are beyond the scope of the criminal proceeding, however, counsel has a duty to ensure that her advice is reasonably competent. That duty arises from counsel's responsibility to respect that the decision whether to plead guilty, or instead to go to trial, belongs to the defendant personally. *Florida* v. *Nixon*, 543 U.S. 175, 187 (2004). In assisting the defendant with that choice, counsel must ensure that she does not actively interfere with or undermine the defendant's independent ability to decide. When counsel offers professionally incompetent advice about a consequence of conviction that she reasonably should know may be relevant to the defendant's deci-

sion, counsel risks inducing the defendant to rely on that misadvice in deciding whether to plead. Such misadvice—regardless whether it concerns a matter within or beyond the scope of the criminal proceeding—may thereby impermissibly skew the defendant's decision-making process. Accordingly, legal advice that counsel provides to a defendant about consequences outside the scope of the criminal proceeding is subject to *Strickland*'s requirement of reasonable competence, and deficient performance in providing that advice can support an ineffective-assistance claim.

III. Although the Supreme Court of Kentucky erred in holding that misadvice about immigration consequences can never constitute deficient performance, this Court should nonetheless affirm the judgment below, on the ground that petitioner cannot establish that he suffered prejudice as a result of counsel's errors. *Hill* v. *Lockhart*, 474 U.S. 52, 58-59 (1985). To demonstrate prejudice in connection with a guilty plea, the defendant must show a reasonable probability that a rational defendant in her position would not have pleaded had she received competent advice. *Ibid.*; see *Roe* v. *Flores-Ortega*, 528 U.S. 470, 484-486 (2000). That inquiry is important for claims based on misadvice about removal and similar consequences, because it distinguishes defendants who merely regret their pleas in hindsight, when faced with later adverse consequences, from defendants whose attorneys' deficient advice skewed their plea decision at the time. Here, the record of petitioner's criminal proceeding establishes that a rational defendant would have pleaded guilty even after receiving correct information about potential removal consequences. Because petitioner cannot establish prejudice, the judgment should be affirmed.

ARGUMENT

A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL MAY BE BASED ON INCOMPETENT ADVICE ABOUT THE IMMIGRATION CONSEQUENCES OF A PLEA, BUT THE DEFENDANT MUST ALSO ESTABLISH PREJUDICE

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused" has the right to "the [a]ssistance of [c]ounsel for his defence." U.S. Const. Amend. VI. That right comprehends the *effective* assistance of counsel. *Strickland* v. *Washington*, 466 U.S. 668, 686 (1984). Because the constitutional right to counsel is designed to protect the defendant in the criminal proceedings, the Sixth Amendment does not require counsel to provide advice on immigration and other consequences of conviction that are beyond the scope of the criminal proceeding. But if counsel chooses to provide such advice, she has a duty to ensure that her advice is within the "range of competence demanded of attorneys in criminal cases." *McMann* v. *Richardson*, 397 U.S. 759, 771 (1970). The vast majority of the lower courts considering claims of ineffective assistance in the plea context have drawn precisely that distinction—between defense counsel who remain silent and defense counsel who give affirmative misadvice.[2] Here, the court below erred in categorically holding that misadvice on removal can never form the basis of an ineffective-assistance

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[2] Compare, *e.g.*, *United States* v. *Fry*, 322 F.3d 1198 (9th Cir. 2003) (no duty to advise on removal); *Broomes* v. *Ashcroft*, 358 F.3d 1251 (10th Cir.), cert. denied, 543 U.S. 1034 (2004); *United States* v. *Santelises*, 509 F.2d 703, 704 (2d Cir. 1975); *Commonwealth* v. *Fuartado*, 170 S.W.3d 384 (Ky. 2005), with *United States* v. *Kwan*, 407 F.3d 1005 (9th Cir. 2005) (erroneous advice can be deficient performance); *United States* v. *Couto*, 311 F.3d 179, 188 (2d Cir. 2002); *People* v. *Correa*, 485 N.E.2d 307 (Ill. 1985).

claim. But the inability of petitioner here to show prejudice precludes his establishment of a constitutional violation.

I. COUNSEL'S SIXTH AMENDMENT OBLIGATION AT THE PLEA STAGE DOES NOT EXTEND TO PROVIDING ADVICE BEYOND THE SCOPE OF THE CRIMINAL CASE

A. The Right To Effective Assistance Of Counsel Pertains To The Defense Of The Criminal Case

The guarantee of effective assistance of counsel applies in all "criminal prosecutions." U.S. Const. Amend. VI. It extends to all critical stages of the adversarial criminal process, see *Rothgery* v. *Gillespie County*, 128 S. Ct. 2578, 2591 (2008), and comprehends counsel's advice in deciding whether to plead guilty or go to trial. See, *e.g.*, *Hill* v. *Lockhart*, 474 U.S. 52, 56-57 (1985); *Tollett* v. *Henderson*, 411 U.S. 258, 266-268 (1973).

The scope of counsel's duty to advise the defendant concerning the plea decision—in other words, the "meaning" of the effective-assistance guarantee in the plea context—is a function of "the purpose of the effective assistance guarantee of the Sixth Amendment." *Strickland*, 466 U.S. at 689; *id.* at 686. That purpose is to promote the "proper functioning of the adversarial process," which, in turn, ensures that criminal prosecutions reach just and reliable results. *Ibid.* In the "criminal prosecution[]" to which the Sixth Amendment applies, the defendant faces a "tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." *Johnson* v. *Zerbst*, 304 U.S. 458, 462-463 (1938). The assistance of counsel is necessary "to 'protec[t] the unaided layman at critical confrontations' with his 'expert adversary,' the government." *McNeil* v. *Wisconsin*, 501 U.S. 171,

177-178 (1991) (brackets in original) (quoting *United States* v. *Gouveia*, 467 U.S. 180, 189 (1984)). The right attaches when the government has committed itself to prosecute, such that "the accused 'finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'" *Rothgery*, 128 S. Ct. at 2583 (quoting *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972)). The right to effective assistance of counsel therefore serves to "minimize the imbalance in the adversary system" in order to safeguard the defendant's ability to confront the prosecution and to test its charges and evidence. *United States* v. *Ash*, 413 U.S. 300, 309-311 (1973).

Because "counsel's function * * * is to make the adversarial testing process work in the particular case," *Strickland*, 466 U.S. at 690, counsel is not constitutionally required to provide advice on matters that will not be decided in the criminal case: matters that have nothing to do with the defendant's guilt or innocence of the charges and that are not part of the punishment that the prosecution seeks to impose for the offense. As the Court noted in *Strickland*, "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation * * * [but] is simply to ensure that criminal defendants receive a fair trial." *Id.* at 689. Counsel's errors therefore violate the right to effective assistance only if they are so severe as to "undermine[] the proper functioning of the adversarial process," thereby casting doubt on the reliability of its outcome. *Id.* at 686. Cf. *Ash*, 413 U.S. at 319 ("Sixth Amendment's counsel guarantee" is fulfilled so long as counsel protects against "inequality in the adversarial process itself."); *Commonwealth* v. *Fuartado*, 170 S.W.3d 384, 386 (Ky. 2005).

B. The Scope Of Counsel's Duties Within The Criminal Case Extends To Guilt And Sentencing

In counseling a defendant whether to plead guilty, the attorney's duty to advise the defendant extends to the facts and law necessary to enable the defendant to evaluate the plea's strategic implications for the defendant's interests within the criminal case—in other words, the defendant's interests, as against her prosecutorial adversary, in minimizing the jeopardy that she faces in the criminal proceeding.

As this Court's decisions make clear, counsel's duty encompasses advising the defendant on relevant guilt-innocence and sentencing issues so that the defendant has a meaningful understanding of a guilty plea's strategic implications for the defendant's interests within the criminal case. Counsel must advise on whether, given the strength of the prosecution and defense cases, the defendant has any realistic opportunity to avoid conviction on some or all charges by going to trial, and so whether pleading guilty would not represent an advantageous resolution of the proceedings. See *Libretti* v. *United States*, 516 U.S. 29, 50-51 (1995); *Brady* v. *United States*, 397 U.S. 742, 748 n.6 (1970); *Hill*, 474 U.S. at 59; *Tollett*, 411 U.S. at 268. Counsel must also explain the penalties that the defendant faces in the criminal proceeding—the punishment that the prosecution can seek to impose for the offense, and the plea's likely effect on the nature and scope of the punishment. See *id.* at 268; *Hill*, 474 U.S. at 56. And counsel must ensure that the defendant understands the rights within the criminal process that she would surrender by pleading—the constitutional trial rights that she would waive, as well as the ability to hold the prosecution to its bur-

den of proof. *Libretti*, 516 U.S. at 50-51; *Brady*, 397 U.S. at 748 n.6.

All of these affirmative obligations promote the defendant's capacity to evaluate intelligently how to resolve her jeopardy in the criminal proceeding, in light of the defense options available and the potential punishments. As petitioner notes (Pet. Br. 29), counsel's duty to advise the defendant extends beyond the basic topics that the court must explain in a guilty plea colloquy to ensure that the defendant's plea is knowing, intelligent, and voluntary. Counsel, unlike the court, must not only ensure that the defendant understands the charges and her trial rights, but also the strategic considerations surrounding a guilty plea. See *Brady*, 397 U.S. at 748 n.6. For example, defense counsel has a duty to evaluate and advise the defendant about possible affirmative defenses, see *Hill*, 474 U.S. at 59, while the trial court does not. See *United States* v. *Broce*, 488 U.S. 563, 574 (1989) (a guilty plea extinguishes defenses without the need for an express waiver even though "[a] failure by counsel to provide advice may form the basis of a claim of ineffective assistance"); *Mitchell* v. *Scully*, 746 F.2d 951, 956-957 (2d Cir. 1984) (noting that a defendant who pleads guilty must be advised of the nature of the offense, but "[a]n affirmative defense stands differently"), cert. denied, 470 U.S. 1056 (1985). The difference between the duties of the court and the duties of counsel has particular resonance in the plea-negotiation context: counsel has a duty "to inform a defendant of the advantages and disadvantages of a plea agreement," *Libretti*, 516 U.S. at 50, but "[t]he court must not participate" at all in discussions concerning a plea agreement. Fed. R. Crim. P. 11(c)(1).

While counsel's duties are not limited to the inquiries that a court must undertake in ensuring that a guilty plea is knowing, intelligent, and voluntary, the Court has never suggested, and the Sixth Amendment does not mandate, that counsel must advise the defendant about matters that are *not* part of the criminal jeopardy that the defendant faces and therefore are beyond the scope of the criminal proceeding. A myriad of consequences may arise from a conviction that are not a component of the defendant's punishment for the offense and will not be imposed by the presiding court—in other words, consequences that are usually termed "collateral." See *United States* v. *Gonzalez*, 202 F.3d 20, 27 (1st Cir. 2000). For example, defendants may face loss of a professional license or federal benefits, may be required to register as a sex offender, may be exposed to civil liability, or may lose the right to vote, possess firearms or hold public office. Because these consequences are not part of the criminal jeopardy faced by the defendant in the adversarial process, the Sixth Amendment does not require counsel to advise about them.[3]

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[3] Contrary to petitioner's argument (Pet. Br. 22-25), *Hill* does not hold that counsel has a wide-ranging duty to advise the defendant about all consequences, even those outside of the criminal adversarial proceeding. *Hill* concerned a claim that the defendant had been misadvised concerning parole eligibility, a matter that a panel of the court of appeals had deemed "collateral." 474 U.S. at 55. The Court in *Hill* found "it unnecessary to determine whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel, because in the present case we conclude that petitioner's allegations are insufficient to satisfy the *Strickland* v. *Washington* requirement of 'prejudice.'" *Id.* at 60. *Hill* thus did not examine the scope of counsel's duties —the performance aspect of *Strickland*. *Hill* also does not support petitioner's claim that the failure to give advice about collateral con-

As petitioner argues (Br. 36-43), certain professional standards of conduct state that counsel should "determine and advise the defendant * * * as to the possible collateral consequences that might ensue from entry of the contemplated plea." ABA, *Standards for Criminal Justice: Pleas of Guilty* § 14-3.2(f) (3d ed. 1999); see *INS* v. *St. Cyr*, 533 U.S. 289, 322-323 & nn.48 & 50 (2001) (noting ABA and criminal-practitioner admonitions to advise about removal consequences). But those best-practices formulations do not define the meaning of the Sixth Amendment. Professional standards are "guides to determining what is reasonable, but they are only guides." *Roe* v. *Flores-Ortega*, 528 U.S. 470, 479 (2000) (quoting *Strickland*, 466 U.S. at 688). While thoroughly counseling a criminal defendant about relevant collateral consequences, including deportation, would certainly be desirable, the Sixth Amendment does not provide a right to a lawyer who will investigate and advise about all possible material issues that are outside of the criminal prosecution itself. Rather, the purpose of the constitutional guarantee is to provide a lawyer to respond to the prosecution's *criminal* case.

C. The Possibility Of Removal Based On A Conviction Is Not Part Of A Defendant's Criminal Jeopardy

Removal from the country is normally beyond the scope of the defendant's jeopardy in the criminal adversarial process, and counsel therefore generally has no affirmative duty to provide advice on that topic. Although removal may be a significant adverse consequence for many alien defendants, and certain convic-

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sequences may violate counsel's performance duties, because *Hill* concerned *erroneous* advice by counsel, which can support a *Strickland* claim. See Pt. II, *infra*.

tions render aliens ineligible for many forms of relief, see 8 U.S.C. 1158(b)(2)(B)(i), 1182(h), 1227(a)(2)(A)(iii), 1228(b), 1229b(a)(3), 1229b(b)(1)(C); removal is not a part of the punishment for any criminal offense. See *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984); *United States* v. *Amador-Leal*, 276 F.3d 511, 515-516 (9th Cir.), cert. denied, 535 U.S. 1070 (2002). Rather, it is an independent civil proceeding, *Lopez-Mendoza*, 468 U.S. at 1038, that may or may not subsequently be instituted, based on the standards set forth in the immigration statutes. And it is usually instituted by the Department of Homeland Security, which is an authority independent of the presiding court (and is an independent sovereign, in the case of state convictions).[4]

Although removal is generally not part of the criminal proceeding, the prospect of removal may fall within counsel's duty to give advice when it becomes part and parcel of a plea agreement. For instance, in federal prosecutions, the government may raise the subject of removal in the context of plea negotiations, by offering to agree to a reduced sentence if the defendant agrees not to contest removal. See, *e.g.*, *United States* v. *Pereira*, 465 F.3d 515, 523 n.7 (2d Cir. 2006). And by statute, a defendant may stipulate to a judicial order of removal "as a condition of the plea agreement or as a

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[4] Under 8 U.S.C. 1228(c)(1), a federal district court may enter an order of "judicial removal" at the time of sentencing in a criminal case, upon the request of the United States Attorney, with the concurrence of immigration officials, and in the discretion of the court. But even the concomitant entry of a judicial order of removal does not, by itself, render the prospect of removal part of the Sixth Amendment jeopardy the defendant faces in the prosecution. As noted, removal is not a punishment for the crime, but is a prospective remedy concerning the alien's "right to remain in th[e] country in the future." *Lopez-Mendoza*, 468 U.S. at 1038.

condition of probation or supervised release, or both." 8 U.S.C. 1228(c)(5). In these circumstances, counsel's duty to negotiate a plea and sentence on behalf of her client would include both performing the reasonable research necessary to understand the value to her client of the government's proposal, and then advising the client on the matter.[5] See *United States* v. *Barnes*, 83 F.3d 934, 939-940 (7th Cir.), cert. denied, 519 U.S. 857 (1996). But that obligation arises only when removal consequences are incorporated into the plea agreement or the criminal judgment, because only then is advising a client about removal a part of advocating for her interests within the criminal proceeding.

Even assuming that criminal counsel must provide immigration advice to alien defendants in other situations—when removal is not itself part of the criminal proceeding—a defendant in these cases would rarely be able to establish prejudice, which is a requirement for this kind of Sixth Amendment claim. To meet the prejudice standard, the defendant must show that, as an ob-

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[5] In addition, defendants may argue in certain cases that they should be given a reduced sentence either to enable them to avoid removal, see Pet. Br. 46, or because removal itself is a severe consequence. A defendant could thus argue that counsel performed deficiently by failing to seek sentencing leniency on such bases. Such claims, however, would not challenge the validity of the plea. And these *Strickland* claims would not prevail if counsel made a reasonable professional judgment that immigration consequences would likely hold little sway at sentencing, or if the defendant could not establish prejudice—both of which inadequacies are likely in view of the limited weight of removal in the sentencing calculus. See, *e.g.*, *United States* v. *Rivera*, 527 F.3d 891, 912 (9th Cir.) (district court's refusal to take removal into account was reasonable), cert. denied, 129 S. Ct. 654 (2008); *Velasquez* v. *United States*, No. 07-cv-4419, 2008 WL 397874 (E.D.N.Y. Feb. 14, 2008); *United States* v. *Cabrera*, No. 07-077-ML, 2009 WL 1530703, at *2 (D.R.I. May 28, 2009).

jectively reasonable matter, she would not have pleaded guilty but for counsel's deficient failure to advise. *Hill*, 474 U.S. at 59. As a rule, alien defendants are "acutely aware" that because they are aliens, removal is a possible consequence of conviction. *St. Cyr*, 533 U.S. at 322. An alien defendant who pleads guilty without having received any advice about immigration consequences—either because she did not ask about immigration consequences or because she did ask but received no answers—typically knows that she faces some uncertain risk of removal or other immigration consequences. Her decision to proceed in these circumstances indicates that resolving the criminal case mattered more to her than measuring or minimizing the chance of removal. Such a defendant will therefore be unable to credibly allege that she would not have pleaded guilty but for counsel's failure to advise her about potential immigration consequences, and thus will almost certainly be unable to establish prejudice. See *Parry* v. *Rosemeyer*, 64 F.3d 110, 118-119 (3d Cir. 1995) (concluding that, where the subject of parole revocation "never came up," other factors, including potential sentencing consequences, drove the defendant's plea decision), cert. denied, 516 U.S. 1058 (1996); see Pt. III, *infra*.

D. Practical Considerations Support Limiting Counsel's Duties To The Criminal Prosecution

Imposing an affirmative, independent duty on defense counsel to advise about matters outside the scope of the criminal case would also create significant practical concerns.

First, the obligation to investigate and advise the defendant on any consequence that may be of importance to her, Pet. Br. 16-17, 32-33, would impose a significant burden on defense counsel. See *United States* v.

Yearwood, 863 F.2d 6, 8 (4th Cir. 1988). Counsel would have to determine which of the myriad adverse consequences that can flow from a conviction are important to the defendant, and then perform the necessary research to give reasonable advice with respect to each. Although petitioner suggests that this Court could extend counsel's duty of affirmative advice to removal but not to other consequences because removal "is different in kind from other collateral consequences," Pet. Br. 54; see *id.* at 50-54, that is not so. Removal may be a significant consequence for many defendants, but so are other collateral consequences, such as sex offender registration, civil commitment, and professional disbarment.[6]

In addition, defense attorneys would be forced to investigate and answer complex legal questions in which they have little or no expertise or experience. See, *e.g.*, *United States* v. *Morse*, 36 F.3d 1070, 1072 (11th Cir. 1994) (loss of federal benefits); *Kratt* v. *Garvey*, 342 F.3d 475, 485 (6th Cir. 2003) (revocation of pilot license). It is no answer to suggest, as petitioner does (Pet. Br. 39), that counsel can associate with or consult knowledgeable attorneys, because such resources may not be readily available or free of charge. The logic of petitioner's argument is that, if appointed criminal counsel felt herself insufficiently versed in immigration law (or

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[6] See, *e.g.*, *Steele* v. *Murphy*, 365 F.3d 14, 17 (1st Cir.) (defendant was unaware of committal for life as sexually dangerous person), cert. denied, 543 U.S. 893 (2004); *United States* v. *Bethurum*, 343 F.3d 712, 715 (5th Cir. 2003) (defendant alleged that "as an employee of his family's gun dealership, he would not have pleaded guilty to the offense had he known that the conviction would affect his ability to possess firearms"), cert. denied, 540 U.S. 1162 (2004); *United States* v. *Cariola*, 323 F.2d 180, 181-182 (3d Cir. 1963) (defendant alleged that loss of right to vote was particularly severe for him because of his position as a union leader).

other relevant collateral matters), a judge would be required to appoint additional qualified counsel to provide the advice desired—or risk the defendant's later collateral challenge to any ensuing conviction.

Advising defendants on immigration law in particular can involve complex legal and factual questions— ranging from the characterization of an offense for immigration purposes, to naturalization questions, to research into an alien defendant's past immigration status—that are unfamiliar to many criminal defense attorneys. See *Zhang* v. *United States*, 506 F.3d 162, 169 (2d Cir. 2007). The duty that petitioner proposes would thus require counsel to go beyond "the range of competence demanded of attorneys in criminal cases." *McMann*, 397 U.S. at 771.

Second, imposing a duty on counsel to advise about any and all adverse effects of conviction would undermine the finality of plea-based convictions and could strain judicial and prosecutorial resources. Many defendants would likely not challenge their pleas until years later, when the collateral consequences of the conviction first become evident. See, *e.g.*, *Santos-Sanchez* v. *United States*, 548 F.3d 327, 329 (5th Cir. 2008), petition for cert. pending, No. 08-9888 (filed Apr. 15, 2009); *People* v. *Gutierrez*, No. B209591, 2009 WL 2025638 (Cal. App. July 14, 2009). The sheer multiplicity of adverse consequences that could form the basis of plea challenges—and defendants' incentive to attack otherwise valid pleas by raising these consequences—could lead to an influx of challenges to long-final pleas. These claims could be hard for the government to refute, because the existing record might not be sufficient to avoid the need for an evidentiary hearing and because memories of the trial participants would fade over time. And if pleas were set

aside only because the passage of time rendered the government unable to muster its proof, significant costs would result—either the dismissal of charges to which the defendant once admitted her guilt, or the expense and burden of a new trial. Those costs should not be imposed based on expansion of counsel's duty to advise on a criminal defendant's collateral, non-criminal interests.

II. COUNSEL'S DUTY TO RESPECT THE DEFENDANT'S PERSONAL DECISION WHETHER TO PLEAD GUILTY ENTAILS THE DUTY TO AVOID INCOMPETENT ADVICE ABOUT CONSEQUENCES OF A CONVICTION

Although defense counsel has no affirmative duty to advise the defendant on removal and other consequences that are beyond the scope of the criminal proceeding, counsel must ensure that if she does provide advice on such consequences, it falls "within the range of competence demanded of attorneys in criminal cases." *McMann*, 397 U.S. at 771.

A. Counsel Must Respect That The Decision Whether To Plead Guilty Belongs To The Defendant Personally

The decision whether to plead guilty is personal to the defendant, who alone has the "ultimate authority" to decide to enter a guilty plea. *Florida* v. *Nixon*, 543 U.S. 175, 187 (2004); *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983); *Brady*, 397 U.S. at 748 (decision must be an "expression of [the defendant's] own choice"). Because a guilty plea is both a conviction and a waiver of several constitutional trial rights, the decision to plead is "of signal significance" in the criminal proceeding and requires the "utmost solicitude." *Nixon*, 543 U.S. at 187 (quoting *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969)).

Defense counsel's obligation is to assist the defendant in her decision-making process. To that end, defense counsel ordinarily should offer a recommendation on the plea. *Von Moltke* v. *Gillies*, 332 U.S. 708, 721 (1948) (plurality opinion). But counsel must always ensure that the defendant understands the decision to plead guilty as hers alone to make, and that the decision made is in fact the defendant's personal choice, free of undue pressure from the court or prosecution. *Nixon*, 543 U.S. at 187; see ABA, *Standards for Criminal Justice: Prosecution Function & Defense Function* § 4-5.1 cmt. (3d ed. 1993) (*ABA Standards*); cf. *Flores-Ortega*, 528 U.S. at 478 (counsel has duty to assist defendant in deciding whether to appeal, including by "making a reasonable effort to discover the defendant's wishes"); *Nichols* v. *Butler*, 953 F.2d 1550, 1553 (11th Cir. 1992) (en banc) (counsel must ensure that defendant understands that whether to testify is the defendant's personal decision, and that defendant's right to decide "is protected").[7]

A corollary to that duty, necessitated by the "utmost solicitude" due the defendant's decision, *Nixon*, 543 U.S. at 187, is that counsel must not inappropriately interfere with the defendant's decision-making process. Thus, counsel may not "override his client's desire * * * to plead not guilty." *Brookhart* v. *Janis*, 384 U.S. 1, 7-8 (1966); see *Nixon*, 543 U.S. at 187. Counsel also may perform deficiently if she improperly burdens the defendant's decision, for instance by threatening to withdraw or taking other actions that might unduly influence the

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[7] The right to appeal and the right to testify are particularly apt analogies, because those rights, like the decision to plead guilty, are among the few that the defendant, rather than counsel, must make personally. See *Jones*, 463 U.S. at 751.

decision-making process. See *Wellnitz* v. *Page*, 420 F.2d 935, 936 (10th Cir. 1970) (coercive pressure and "unfair[]" "assurance[s] of leniency" constitute improper interference); *Nichols*, 953 F.2d at 1553 (threat to withdraw is improper interference with right to decide whether to testify); *ABA Standards* § 4-5.2 cmt. ("[I]t is highly improper for counsel to demand that the defendant follow what counsel perceives as the desirable course or for counsel to coerce a client's decision through misrepresentation or undue influence").

B. Incompetent Advice May Undermine The Defendant's Decision-making

Like threats of withdrawal and other forms of undue influence, counsel's incompetent advice may improperly interfere with the defendant's decision-making process. A defendant is entitled to, and likely will, rely on any advice provided by her counsel, if counsel represents that she is able to give the defendant an authoritative and informed view of the law and facts. See *McMann*, 397 U.S. at 770. This is true not only of advice regarding the criminal proceeding itself, but also of advice on subjects outside its scope, such as collateral legal consequences that the defendant would wish to avoid if possible. Thus, when counsel provides the defendant with purportedly authoritative but professionally incompetent and erroneous advice on a collateral consequence of conviction, and counsel reasonably should know the defendant will consider that advice in deciding whether to plead guilty, counsel improperly undermines the defendant's decision-making process, in violation of a constitutional duty. Counsel, in short, has a responsibility to provide professionally reasonable advice, if she provides any advice, even on topics as to which she need not provide advice at all. Cf. *Libretti*, 516 U.S. at 50-51 (district

court has no obligation to hold a colloquy on a defendant's waiver of a jury trial to decide forfeiture, but "a district judge must not mislead a defendant regarding the procedures to be followed in determining whether the forfeiture" will be imposed).

Counsel's erroneous advice can skew a defendant's decision-making process because such advice leaves the defendant in a markedly worse position than if she had received no advice at all. See Pet. App. 26a. When counsel provides no advice about collateral consequences, counsel leaves the defendant in a position to determine whether she wants such advice or information before making a decision in the criminal case. If that defendant pleads guilty without seeking such advice, she has made her own plea decision with the knowledge that she faces uncertainty about collateral consequences. Counsel has therefore assisted the defendant to the extent required by the Sixth Amendment and has not taken any action that affirmatively interferes with the defendant's decision-making process.

In contrast, when counsel gives her client seemingly authoritative but materially incorrect advice on a collateral consequence, counsel may actively induce the defendant to rely on the misadvice in deciding whether to plead. That misadvice injects a new factor into the defendant's decision and simultaneously misleads her about it.[8] By causing the defendant to believe, wrongly, that she has a definitive and correct understanding of an

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[8] Because counsel distorts the plea decision process only when she induces the client to rely on the misadvice, statements that reflect uncertainty about removal consequences should not be considered misadvice. See, *e.g.*, *Santos-Sanchez*, 548 F.3d at 332-333 (no misadvice when counsel stated that conviction "may" result in removal); cf. *Zhang*, *supra* (same as to statements by court).

issue that is important to her decision, counsel affirmatively and improperly skews the defendant's evaluation of all of the other considerations surrounding the plea. Counsel thus undermines the integrity of the defendant's decision-making process, in violation of counsel's duty to safeguard the defendant's ability to make her own decision about a plea.

C. Recognizing A Duty To Avoid Incompetent Advice Even When Counsel Has No Duty To Speak Is Consistent With Related Legal Principles

The conclusion that counsel need not affirmatively advise defendants about collateral consequences, but must provide reasonably competent advice if she chooses to provide any at all, has analogues in the standards of conduct governing lawyers generally. When an attorney gives legal advice, inviting her audience to rely on it, the attorney owes a duty of care, regardless of whether she was obligated to give the advice in the first place. See 1 Restatement (Third) of the Law Governing Lawyers § 51(2) & cmt. e (2000); *id.* § 14 cmt. e; *Goodman* v. *Kennedy*, 556 P.2d 737, 743 & n.4 (Cal. 1976). That duty is similar to a physician's duty to "first, do no harm": Although doctors do not invariably have a duty to provide medical care, AMA, *Principles of Medical Ethics* para. VI (2001), any care that they decide to provide is held to professional standards of patient care, see generally *Fruiterman* v. *Granata*, 668 S.E.2d 127, 136-137 (Va. 2008); Karen H. Rothenberg, *Who Cares?: The Evolution of the Legal Duty to Provide Emergency Care*, 26 Hous. L. Rev. 21, 25, 35-40 (1989).

Counsel's duty to provide reasonably competent advice if she chooses to speak, even though she could decline to give advice in the matter, also has analogues in other areas of law. Tort law, for instance, generally

does not impose an affirmative duty to take action, but when a person voluntarily does so, thereby inducing reliance, she is held to a duty of reasonable care. See, *e.g.*, *First Nat'l Bank* v. *Small Bus. Admin.*, 429 F.2d 280, 288 (5th Cir. 1970); 3 Restatement (Second) of Torts §§ 551, 552 (1965). And while a State has no constitutional obligation to provide medical care and other services to its citizens, when the State institutionalizes a person, her resulting dependence gives rise to a duty to provide necessary services and to exercise reasonable care in doing so. See *Youngberg* v. *Romeo*, 457 U.S. 307, 317-319 (1982). When a lawyer causes her client to rely on her advice, a similar duty of reasonable competence arises.

D. Misadvice On Immigration Consequences May Constitute Deficient Performance

In light of these principles, misadvice on immigration consequences can rise to the level of deficient performance under *Strickland*. Not all wrong advice, however, would do so. A defendant would have to establish that counsel's advice was not only erroneous, but sufficiently unreasonable that it falls below the standard of competence set forth in *Hill*, 474 U.S. at 56-57, and *Strickland*, 466 U.S. at 687. That analysis should take into account that immigration-law questions may be complex and that the standard of competence refers to "attorneys in *criminal* cases." *McMann*, 397 U.S. at 771 (emphasis added). But the Supreme Court of Kentucky erred in holding that misadvice about "collateral consequences," including immigration, can never constitute deficient performance. Pet. App. 23a.

III. ALTHOUGH PETITIONER HAS ALLEGED THAT HE RECEIVED MISADVICE, PETITIONER CANNOT ESTABLISH THAT HE SUFFERED PREJUDICE

Although the Supreme Court of Kentucky erred in holding that incompetent advice on immigration consequences can never constitute deficient performance, this Court may affirm the judgment below on the ground that petitioner cannot establish *Strickland*'s second requirement—that counsel's errors prejudiced him. 466 U.S. at 687; *Hill*, 474 U.S. at 59 (affirming judgment based on insufficiency of allegations of prejudice, when court of appeals had found no deficient performance). To demonstrate prejudice, petitioner must establish a reasonable probability that had he been competently advised, he would not have pleaded guilty, but instead would have insisted on going to trial. *Id.* at 59-60. The Supreme Court of Kentucky did not decide whether petitioner would be able to demonstrate prejudice, and this Court normally does not consider questions not passed on below. See *Wilson* v. *Arkansas*, 514 U.S. 927, 937 (1995). But, as in *Hill*, and in light of the importance of the prejudice inquiry to the analysis of misadvice claims, a decision applying the prejudice standard to petitioner's case would provide valuable guidance to the lower courts.

A. Defendants Who Challenge Guilty Pleas Based On Alleged Immigration Misadvice Must Establish That, With Correct Advice, They Would Have Gone To Trial

To demonstrate prejudice, a defendant must show that "counsel's constitutionally ineffective performance affected the outcome of the plea process," such that a competently counseled defendant "would not have pleaded guilty and would have insisted on going to trial."

Hill, 474 U.S. at 59; see *ibid.* (inquiry turns on whether competent performance "would have led counsel to change his recommendation as to the plea"). The prejudice inquiry is founded on the principle that only attorney errors that affect the outcome of the adversarial process should be grounds for relief, *Strickland*, 466 U.S. at 691—and on the recognition that the government's substantial interest in the finality of guilty pleas would be undermined if it were too easy for defendants seeking a better outcome to challenge a plea after the fact, *Hill*, 474 U.S. at 58.

These concerns are significant in challenges to a plea based on alleged misadvice about removal. When faced with removal, defendants will have every incentive to challenge their former pleas, regardless of whether a correct understanding of removal consequences would have altered their decisions at the time. These defendants can easily allege, after the fact, that they would not have pleaded guilty had they been given competent advice. If every such credited allegation established prejudice, the prejudice inquiry would fail to filter out cases in which counsel's deficiency did not actually affect the outcome of the proceeding. Cf. *Strickland*, 466 U.S. at 697 (ineffective assistance claim can be resolved by finding lack of prejudice without reaching adequacy of performance).

Courts considering claims like petitioner's should therefore apply the prejudice prong rigorously, by closely examining the record of the criminal proceeding to determine whether, in light of the prosecution's evidence and the available defense options, a reasonable defendant would have pleaded guilty notwithstanding the possibility of removal. See *Hill*, 474 U.S. at 59.

B. A Showing Of Prejudice Turns On An Objective Test

The prejudice inquiry is an objective one, asking whether, if given competent advice about the chances of prevailing at trial, "a rational defendant [would have] insist[ed] on going to trial." *Flores-Ortega*, 528 U.S. at 486; *Meyer* v. *Branker*, 506 F.3d 358, 369 (4th Cir. 2007) (*Hill*'s prejudice prong is "an objective inquiry."), cert. denied, 128 S. Ct. 2975 (2008); *United States* v. *Curry*, 494 F.3d 1124, 1131 (D.C. Cir. 2007); *Richardson* v. *United States*, 379 F.3d 485, 488-489 (7th Cir. 2004).

As a result, a defendant's subjective allegation that she would have chosen to go to trial, without more, is insufficient to establish prejudice. See *Hill*, 474 U.S. at 59; see, *e.g.*, *United States* v. *Arteca*, 411 F.3d 315, 321-322 (2d Cir. 2005) (citing "weight of authority" among other courts); cf. *Flores-Ortega*, 528 U.S. at 486 (fact that defendant "demonstrated to counsel his interest in an appeal," without more, is "insufficient to establish that, had the defendant received reasonable advice from counsel," she would have appealed). Rather, a defendant must support her assertion by showing that, in view of all of the considerations in play at the time of the plea—the chances of prevailing at trial, given the strength of the prosecution's case and the availability of any defenses, and the relative advantages and disadvantages of a trial and a plea—going to trial would have been a rational choice.[9] See *Hill*, 474 U.S. at 59 (preju-

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[9] Although a defendant may exercise her prerogative to go to trial for irrational reasons, the prejudice inquiry need not take into account such idiosyncracies. Cf. *Strickland*, 466 U.S. at 695 ("An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed."). Crediting pure-

dice analysis entails a "prediction whether the evidence likely would have changed the outcome of a trial"); *Flores-Ortega*, 528 U.S. at 486.

Whether going to trial would have been a rational choice in the circumstances can often be discerned from the record of the criminal proceedings. If the record establishes that a trial would have offered only negligible benefits and significant costs, such that going to trial would have been irrational, the defendant will be unable to establish prejudice, and an evidentiary hearing is unnecessary. See, *e.g.*, *In re Sealed Case*, 488 F.3d 1011, 1019 (D.C. Cir. 2007); *United States* v. *Nino*, 878 F.2d 101, 105 (3d Cir. 1989) (hearing was unnecessary where record showed that "even had petitioner been advised of the deportation consequences of his guilty plea, he would have pled guilty anyway"); *Meyer*, 506 F.3d at 369-370.

C. Petitioner Cannot Establish Prejudice

The record of petitioner's criminal proceeding conclusively demonstrates that petitioner was not prejudiced by counsel's alleged misadvice. As competent counsel would have advised, petitioner faced removal if he was convicted, whether that conviction was the result of a trial or a plea. See *In re Resendiz*, 19 P.3d 1171, 1187 (Cal. 2001). Petitioner's only chance to avoid removal was therefore an acquittal, but the evidence of guilt was overwhelming, and at the same time, going to

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ly subjective desires to "roll the dice" with the jury, despite overwhelming evidence of guilt, would not serve the purposes underlying the right to effective assistance of counsel. Cf. *Hill*, 474 U.S. at 60 (predictions about what advice a competent attorney would give about the outcome of a trial "should be made objectively, without regard for the 'idiosyncrasies of the particular decisionmaker.'") (quoting *Strickland*, 466 U.S. at 695).

trial would have exposed petitioner to a longer sentence. Because competent counsel would have advised petitioner that trial entailed significant risk and conferred no realistic advantage, petitioner cannot establish a reasonable probability that he would have insisted on going to trial. See, *e.g.*, *id.* at 1187-1188; *Gumangan* v. *United States*, 254 F.3d 701, 706 (8th Cir. 2001); *Nino*, 878 F.2d at 105.

Petitioner had no realistic chance of being acquitted at trial. The evidence would have shown that petitioner was lawfully stopped at a weigh station, and arrested after law enforcement officers found marijuana and drug paraphernalia in the cab of his truck. Petitioner consented in writing to a search of the truck's trailer, where officers found approximately 1000 pounds of marijuana. *Commonwealth* v. *Padilla*, No. 01-CR-00517 R. at 30; Findings 1-3. Petitioner then told officers that he had been paid to ship the marijuana. *Id.* at 3. Although petitioner moved to suppress the evidence of the drugs and his statements, the court denied the motion in full after a hearing at which one of the arresting officers testified. *Id.* at 1. The evidence at trial therefore would have overwhelmingly established that petitioner was caught transporting, for payment, a massive quantity of marijuana in his own truck.

In addition, had petitioner gone to trial, he would have faced a significant risk of receiving a longer term of incarceration than he received in his plea agreement. The offense of trafficking in five pounds or more of marijuana exposed petitioner to five to ten years of imprisonment. See Ky. Rev. Stat. Ann. §§ 218A.1421(4)(a), 532.060(2). The plea agreement recommended an advantageous sentence of a five-year term of incarceration and a five-year term of probation. J.A. 58-59, 63, 69.

Given that petitioner's conduct involved 1000 pounds of marijuana (that is, 995 pounds above the statutory threshold), after trial he faced a substantial possibility of receiving the maximum sentence of ten years' imprisonment.[10] See Order Denying Mot. for Shock Probation (finding probation inappropriate because the "case involved trafficking in almost 1,000 pounds of marijuana"). Both the longer term of incarceration and the decision to put the Commonwealth to its proof rather than accepting responsibility could have adversely affected petitioner's chances of receiving parole.

Faced with the strength of the prosecution's case and the risk of a longer sentence if he went to trial, petitioner pleaded guilty, allegedly after counsel advised him that he "did not have to worry about immigration status since he had been in the country so long." J.A. 72. Assuming that he received such advice, it was incorrect.[11] The Court may also assume that the advice fell outside the range of reasonableness. *Strickland*, 466 U.S. at 687-690. Nevertheless, petitioner can establish prejudice from that erroneous advice only if a rational defendant, advised by competent counsel that removal would likely result from a conviction following trial *or* a

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[10] Petitioner suggests that, if he were found guilty following a trial, he would have been sentenced by the jury, rather than the judge, resulting in a lesser sentence. The assumption of jury leniency, however, is not well-founded. See Nancy J. King & Roosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 Vand. L. Rev. 885, 898 (2004) (discussing practitioners' and judges' views that Kentucky jury sentencing resulted in higher sentences, particularly for drug offenses).

[11] At the time of petitioner's plea, federal law treated his trafficking conviction as an aggravated felony, 8 U.S.C. 1101(a)(43)(B), 1227(a)(2)(A)(iii) and (B)(i) (2002), which rendered him removable and eliminated most grounds for relief from removal. See *Lopez* v. *Gonzalez*, 549 U.S. 47, 50-51 (2006).

plea, would have insisted on going to trial in these circumstances—despite the virtual impossibility of an acquittal and the substantial risk of a longer term of imprisonment. Given that a trial would have provided no real chance of avoiding removal to offset the sentencing benefits associated with a plea, petitioner cannot demonstrate that competent counsel would have advised going to trial. Nor can he demonstrate that going to trial would have been a rational decision. See *Hill*, 474 U.S. at 59; *Parry*, 64 F.3d at 118.

Because the existing record decisively rebuts petitioner's claim of prejudice, the Court need not remand to the Kentucky courts for a determination of prejudice. See, *e.g.*, *Bethel* v. *United States*, 458 F.3d 711, 718-720 (7th Cir. 2006), cert. denied, 549 U.S. 1151 (2007); *Gumangan*, 254 F.3d at 706; *People* v. *Mrugalla*, 868 N.E.2d 303 (Ill. Ct. App. 2007); cf. *Schriro* v. *Landrigan*, 550 U.S. 465, 474 & n.2, 475-477 (2007) (hearing would be "futile" because the trial record refuted defendant's contention that he would have chosen to permit counsel to present mitigating evidence had counsel adequately investigated such evidence). Petitioner will be unable to establish that his plea should be overturned for ineffective assistance of counsel.

CONCLUSION

The judgment of the Supreme Court of Kentucky should be affirmed.

Respectfully submitted.

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JOSE PADILLA,

Petitioner,

v.

KENTUCKY,

Respondent.

On Writ of Certiorari to the Supreme Court of Kentucky

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37.3, the American Bar Association ("ABA"), as *amicus curiae*, respectfully submits this brief in support of Petitioner. The ABA requests that the Court consider the broad-based consensus views embodied in the ABA Standards for Criminal Justice and ABA Model Rules of Professional Conduct in deciding whether a defense attorney's failure to correctly advise a legal permanent resident client concerning the immigration consequences of a guilty plea falls short of the standard of reasonable performance under the Sixth Amendment.

The ABA is the largest voluntary professional membership organization of legal professionals. The ABA membership of more than 400,000 spans all 50 states and other jurisdictions, and includes attorneys in private law firms, corporations, non-profit organizations, government agencies, and prosecutorial and public defender offices, as well as judges, legislators, law professors, and students.[2]

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any member of the judiciary associated with the ABA. No inference should be drawn that any member of the ABA Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This

Since its inception, and as one of the cornerstones of its mission, the ABA has actively sought to improve the quality of legal representation by "[p]romot[ing] competence, ethical conduct and professionalism."[3] The ABA has long been committed to the provision of competent counsel in criminal matters and to protecting the constitutional and statutory rights of non-citizens.

The ABA Standards for Criminal Justice are among the ABA's most prominent efforts to improve the quality of the criminal justice system. Begun in 1964, under the aegis of then-ABA President (and later Justice) Lewis F. Powell, Jr., the Standards were originally published in 17 volumes, separated by topical area.[4] When the first full edition of the Standards was issued, Chief Justice Burger called them "a balanced, practical work intended to walk the fine line between the protection of society and the protection of the constitutional rights of the accused individual." Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 AM. CRIM. L. REV. 251, 251-52 (1974). The ABA has continued to

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brief was not circulated to any member of the Judicial Division Council prior to filing.

[3] ABA Mission and Association Goals, *available at* http://www.abanet.org/about/goals.html.

[4] A history of the development of the ABA Standards for Criminal Justice is available on the ABA Criminal Justice Standards homepage, at www.abanet.org/crimjust/standards/home.html. *See also* Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 CRIM. JUST. 10, 14-15 (Winter 2009) (describing the careful and balanced process by which the Standards are developed and promulgated), which is also available on the ABA website.

develop and refine these Standards over the last forty years through the efforts of broadly representative task forces made up of prosecutors, judges, defense lawyers, academics, the public and other groups that may have a special interest in the subject, as well as by the diverse membership of the ABA.[5]

The ABA Standards do not provide *per se* rules or a "checklist" for judicial evaluation of attorney performance, nor do they purport to establish the constitutional baseline for effective assistance of counsel. *See Rompilla v. Beard*, 545 U.S. 374, 399 (2005) (Kennedy, J., dissenting). The Standards do, however, represent the considered consensus views of prosecutors, defenders, and judges, and constitute a realistic and balanced approach to criminal justice that has proven effective over time. As Chief Justice Burger stated in his concurring opinion in *Argersinger v. Hamlin*, "[t]he right to counsel has historically been an evolving concept," and "[p]art of this evolution has been expressed in the policy prescriptions of the legal profession itself." 407 U.S. 25, 43-44 (1972) (Burger, C.J., concurring in result) (referring to the ABA Project that produced the original ABA Standards for Criminal Justice).

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[5] The ABA Standards for Criminal Justice became official ABA policy after they were approved by vote of the ABA House of Delegates ("HOD"). The HOD is composed of more than 500 representatives from states and territories, state and local bar associations, affiliated organizations, ABA sections, divisions and members, and the Attorney General of the United States, among others. The Standards have been amended over the years by the same process. *See* ABA General Information, *available at* http://www.abanet.org/leadership/delegates.html.

The ABA Standards have frequently been referred to and adopted by courts, legislatures, and executive branch law enforcement agencies. This Court has taken note of the ABA Standards in considering the proper balance of individual rights and societal interests in the criminal justice system, including in the context of the Sixth Amendment right to counsel. *E.g.*, *Rompilla*, 545 U.S. at 387; *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *McKaskle v. Wiggins*, 465 U.S. 168, 179 (1984); *Estelle v. Williams*, 425 U.S. 501, 504 (1976). As this Court has recognized, the Standards provide "guides to determining what [performance of counsel] is reasonable." *Wiggins*, 539 U.S. at 524 (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). As relevant to this case, the Standards require criminal defense counsel to be knowledgeable about the immigration consequences of a non-citizen client's conviction, and to fully inform the client about those consequences.

SUMMARY OF ARGUMENT

A lawyer's duties include providing competent representation to a client and communication with the client concerning matters of significance to the client. As elaborated in the ABA Standards for Criminal Justice, the duties of competence and communication oblige a criminal defense lawyer to be fully informed of the facts and the law, and to advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome. The ABA Standards emphasize the importance of the duty to advise in the context of guilty pleas, a duty that includes a determination of the collateral consequences likely to be important

based on a client's personal circumstances and the charges faced.

The ABA Standards provide that defense counsel should advise a non-citizen client about the immigration consequences of conviction when the client is considering whether to plead guilty, because these consequences will frequently be of even greater importance to the client than the court-imposed penalty. The Standards also provide that defense counsel should be fully informed about the immigration consequences of a guilty plea, because these consequences can shape and determine the outcome of criminal proceedings at various stages, including bail decisions, charges and plea bargains, and sentencing. These requirements do not impose an unreasonable burden on criminal defense lawyers, because they have access to extensive relevant resources and, more important, because they represent clients who are entitled to decide to waive or exercise their constitutional rights based on legal considerations that are important to them.

ARGUMENT

I. UNDER THE ABA CRIMINAL JUSTICE STANDARDS, A LAWYER'S DUTY OF COMPETENCE INCLUDES THE DUTY TO BE INFORMED ABOUT THE CONSEQUENCES OF A CLIENT'S GUILTY PLEA, AND TO ADVISE THE CLIENT ACCORDINGLY.

A lawyer's duty to represent a criminal defendant competently is elaborated throughout all of the volumes of the ABA Standards for Criminal Justice. Specifically, as set out in the volume ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION (ABA 3d ed. 1993) (hereinafter

"Defense Function Standards"),[6] defense counsel is obligated to investigate "facts relevant to the merits of the case and the penalty in the event of conviction." Defense Function Standard 4-4.1(a). This includes "all relevant facts known to the accused." *Id.* at 4-3.2(a). It also includes a duty to investigate fully the client's situation, which is a particularized example of competent representation that all lawyers owe to their clients. As explained in the ABA Model Rules of Professional Conduct, which form the basis for rules governing the professional conduct of lawyers in almost every state, "[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." MODEL RULES OF PROF'L CONDUCT R. 1.1 (ABA 2008) (hereinafter "Model Rules").

Once defense counsel has performed an appropriate investigation, counsel must consult with the client about the legal situation and how possible courses of action will affect it. Thus, Defense Function Standard 4-5.1(a) provides:

> After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.

Offering information about the legal situation and consulting with the client about the direction of the

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[6] *See supra* text accompanying note 4 (ABA Standards for Criminal Justice are divided into volumes by topical areas). Of the volume ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION, only the defense function standards are discussed in this brief.

case, like learning the relevant law and facts, are routine obligations applicable to all lawyers. Under the Model Rules, a lawyer is required to "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Model Rules, R. 1.4(a)(2). The Model Rules also impose a duty to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." *Id.* R. 1.4(b).

A lawyer's obligation to consult with the client applies in the guilty plea context. Indeed, a decision to plead guilty is considered so important under the Model Rules that it is specifically identified as one of the very few where a lawyer is expressly required to "abide by the client's decision, after consultation with the lawyer." Model Rules, R. 1.2(a). *See also* Defense Function Standard 4-5.2(a) (decisions to be made by the accused after full consultation with counsel include what pleas to enter and whether to accept plea agreement). In addition, Standard 14-3.2(b) of the volume ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY (ABA 3d ed. 1999) (hereinafter "Pleas of Guilty Standards") emphasizes the importance of consultation with the client when a guilty plea is a possible course of action:

> To aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and address considerations deemed important by defense counsel or the defendant in reaching a decision. Defense counsel should not recommend to a defendant acceptance of a

> plea unless appropriate investigation and study of the case has been completed.

The duty to inform the client in the context of plea negotiations, and to assist the client in choosing among available courses of action, includes an obligation to provide information about the collateral consequences of conviction.[7] Pleas of Guilty Standard 14-3.2(f) provides:

> To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any

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[7] Two types of collateral consequences are defined in Standard 19-1.1(a) and (b) of the ABA STANDARDS FOR CRIMINAL JUSTICE, COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS (ABA 3d ed. 2004) (hereinafter "Collateral Sanctions Standards"): collateral sanctions and discretionary disqualifications. A collateral sanction is a legal penalty, disability or disadvantage that is imposed automatically upon conviction, even if not included in the sentence; a discretionary disqualification is a penalty, disability or disadvantage that is authorized but not required to be imposed upon conviction.

As described in the commentary to Standard 19-1.1, a collateral sanction "signifies a direct and immediate change in an offender's legal status that does not depend upon some subsequent additional occurrence or administrative action, and that would not have occurred in the absence of a conviction." *Id.* cmt. at 15-16. Deportation may in some cases be a "collateral sanction":

> To the extent a non-citizen's immigration status changes as a result of a criminal conviction, so that the offender becomes automatically deportable without opportunity for discretionary exception or revision, deportation too must be regarded as a "collateral sanction."

Id. at 16.

> plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.

The commentary urges counsel to be "active, rather than passive, taking the initiative to learn about rules in this area rather than waiting for questions from the defendant." *Id.* cmt. at 126-27. The commentary also urges counsel to "interview the client to determine what collateral consequences are likely to be important to a client given the client's particular personal circumstances and the charges the client faces." *Id.* at 127.

The ABA Standards contemplate that the court should participate in informing a defendant who is pleading guilty about possible collateral consequences. Pleas of Guilty Standard 14-1.4(c) ("the court should also advise the defendant that by entering the plea, the defendant may face additional consequences including but not limited to . . . if the defendant is not a United States citizen, a change in the defendant's immigration status"). The Standards also contemplate that, if the defendant needs additional information concerning the potential consequences of the plea, "[t]he court should advise the defendant to consult with defense counsel." *Id.* *See also* Collateral Sanctions Standard 19-2.3(a) (the court should "ensure, before accepting a plea of guilty, that the defendant has been informed of collateral sanctions made applicable to the offense[. This] may be satisfied [except where otherwise required by law or rule of procedure] by confirming on the record that defense counsel's duty of advisement under [Pleas of Guilty] Standard 14-3.2(f) has been discharged.").

As the commentary to Pleas of Guilty Standard 14-3.2 points out, the court's "inquiry is not, of course, any substitute for advice by counsel." *Id.* at 118. This is because:

> The court's warning comes just before the plea is taken, and may not afford time for mature reflection. The defendant cannot, without risk of making damaging admissions, discuss candidly with the court the questions he or she may have. Moreover, there are relevant considerations which will not be covered by the judge in his or her admonition. A defendant needs to know, for example, the probability of conviction in the event of trial. Because this requires a careful evaluation of problems of proof and of possible defenses, few defendants can make this appraisal without the aid of counsel.

Id. *See also* Pleas of Guilty Standard 14-3.2(f) cmt. at 126 ("[O]nly defense counsel is in a position to ensure that the defendant is aware of the full range of consequences that may apply in his or her case."); *State v. Paredez*, 101 P.3d 799, 804-05 (N.M. 2004) (no error in court's general advisement of possible deportation, but counsel was ineffective in failing to advise in detail).

II. THE ABA STANDARDS PROVIDE THAT A LAWYER SHOULD ADVISE A NON-CITIZEN CLIENT ABOUT THE IMMIGRATION CONSEQUENCES OF A GUILTY PLEA BECAUSE THEY WILL FREQUENTLY BE OF CRITICAL IMPORTANCE TO THE CLIENT.

The ABA Standards for Criminal Justice and the Model Rules contemplate that a guilty plea to original

or bargained-for charges, with or without a sentence promise, requires the client's knowing, voluntary, and intelligent assent. *See, e.g.*, Defense Function Standard 4-5.2(a) (decision after full consultation with counsel); Pleas of Guilty Standard 14-3.2(b) (defense counsel should advise client after appropriate investigation); Model Rules R. 1.2(a) (decision after consultation with counsel). As discussed in Section I, *supra*, this requires that the client be fully apprised of the legal consequences that might follow various courses of action.

The Standards recognize that a "serious and growing issue in a significant number of cases involving non-citizens is the grave immigration consequence that may flow from a guilty plea." Pleas of Guilty Standard 14-1.4 cmt. at 58. A plea to an offense defined as an "aggravated felony," such as the drug trafficking charge against petitioner, "generally means certain and speedy deportation" under the 1996 amendments to the Immigration and Nationality Act. *Id.* at 58 n.96. Deportation may be of greater concern to a non-citizen defendant than a prison sentence or fine, because it may deprive the defendant "of all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (Brandeis, J.). Deportation is "at times the equivalent of banishment or exile." *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948).

This Court has recognized that "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." *INS v. St. Cyr*, 533 U.S. 289, 323 (2001) (quoting 3 BENDER, CRIMINAL DEFENSE TECHNIQUES §§ 60A.01, 60A.02[2] (1999)). A non-citizen subject to

deportation whose children or spouse are United States citizens faces an agonizing choice: either deprive them of the opportunities afforded to them as citizens in the United States by taking them to a country they do not know, or leave the United States without them. *See* Bryan Lonegan, *American Diaspora: The Deportation of Lawful Residents from the United States and the Destruction of Their Families*, 32 N.Y.U. REV. L. & SOC. CHANGE 55, 71-76 (2007). Moreover, a non-citizen who came to the United States while young might not even speak the language of the country to which he or she would be deported. In countries such as Haiti, deportees from the United States are imprisoned in brutal and unhealthy conditions. *Id.* at 75.

Recognizing that the prospect of deportation is frequently more important to a criminal defendant than the court-imposed penalty, the Standards emphasize counsel's obligation to fully investigate the relevant facts and law, and to counsel the client about the available options:

> [M]any clients' greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction. To reflect this reality, counsel should be familiar with the basic immigration consequences that flow from different types of guilty pleas, and should keep this in mind in investigating law and fact and advising the client.

Pleas of Guilty Standard 14-3.2 cmt. at 127.

In discussing the importance of immigration consequences in these circumstances, this Court has noted the role of counsel, citing the ABA Standards:

"If a defendant will face deportation as a result of a conviction, defense counsel 'should fully advise the defendant of these consequences.'" *St. Cyr*, 533 U.S. at 322 n.48 (quoting Pleas of Guilty Standard 14-3.2 cmt. at 75 (ABA 2d ed.1982)).[8] *See also Wallace v. Reno*, 24 F. Supp. 2d 104, 110 (D. Mass. 1998) (at the time of conviction in 1996, "it was widely recognized as a violation of an attorney's professional duty to her client not to advise her of the immigration consequences of a plea or conviction") (citing, *inter alia*, cases), *aff'd*, 194 F.3d 279 (1st Cir. 1999); Gabriel J. Chin & Richard W. Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 713-15 (2002) (discussing deportation consequences and lawyer competence); ABA 2007 Report with Recommendation #103E (Commission on Effective Criminal Sanctions) at 3 n.4 (report notes failure of defense counsel to advise non-citizen client about exposure to almost certain deportation "would raise competency questions").[9]

A majority of United States jurisdictions now require a court to notify a defendant of immigration

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[8] In the current, third edition of the volume ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY, published in 1999, Standard 14-3.2(f), which specifically discusses collateral consequences, was added. *See supra* pp. 8-9.

[9] Available at www.abanet.org/leadership/2007/midyear, under "Daily Journal." Although only Resolutions are adopted by the House of Delegates as policy of the ABA, their accompanying Reports must be approved by the sponsoring entity and are considered by the House in determining whether to adopt the Resolutions. *See* ABA Constitution and Bylaws, Article 45.2(3) and (6) (2008-2009) (available from the ABA).

consequences at the time of the plea.[10] As discussed in Section I, *supra*, however, this "is not, of course, any substitute for advice by counsel." Pleas of Guilty Standard 14-3.2 cmt. at 118. In fact, the plea form currently available for use in Kentucky courts both ensures notice of immigration consequences and confirms that the defendant has discussed them with counsel. Ky. Admin. Office of Courts, Form AOC-491 (Rev. 2/2003) ("Motion to Enter Guilty Plea") (requiring defendant to acknowledge, "I understand that if I am not a United States citizen, I may be subject to deportation pursuant to the laws and regulations governing the United States Immigration and Naturalization Service," and requiring defense counsel to certify, "I have reviewed with defendant . . . the foregoing 'Motion to Enter a Plea of Guilty,' and I believe he/she understands these documents").[11]

Defendants who, like petitioner, have been legal residents of the United States for decades, may not realize without competent legal counsel that pleading guilty to a drug trafficking offense will result in almost certain deportation. *See Commonwealth v. Padilla*, 253 S.W.3d 482, 483 (Ky. 2008) (discussing Padilla's long-time residence in the United States, including his service in Vietnam). Similarly, defendants charged with comparatively minor offenses

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[10] *See Brief* Amici Curiae National Association of Criminal Defense Lawyers, *et al.*, App. B (citing 28 states, the District of Columbia and Puerto Rico in which notification by the court is required by rule, statute, or plea form as of 2009); *see also St. Cyr*, 533 U.S. at 322 n.48 (citing 18 states and the District of Columbia as of 2001).

[11] Available at http://courts.ky.gov/NR/rdonlyres/55E1F54E-ED5C-4A30-B1D5-4C43C7ADD63C/0/491.pdf

may not anticipate the disproportionately severe immigration consequences of conviction. *See, e.g., United States v. Graham*, 169 F.3d 787 (3d Cir. 1999) (state-law misdemeanor petty larceny considered aggravated felony for purposes of deportation). As this Court noted, in discussing the frequency with which relief under Section 212(c) of the Immigration and Nationality Act of 1952 had been granted in the years leading up to the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, "Even if the defendant were not initially aware of § 212(c), competent defense counsel, following the advice of numerous practice guides, would have advised him concerning the provision's importance." *St. Cyr*, 533 U.S. at 323 n.50.

III. THE ABA STANDARDS PROVIDE THAT A LAWYER SHOULD BE INFORMED ABOUT THE IMMIGRATION CONSEQUENCES OF CONVICTION BECAUSE THESE CAN SHAPE AND DETERMINE THE OUTCOME OF A CRIMINAL PROCEEDING.

Consideration of a client's immigration status is not only for the specific benefit of the defendant whose legal status will change. It is also intended to enhance the quality of criminal justice generally, because "the draconian nature of [automatic removal of non-citizens upon conviction, without regard to the equities of their particular situations] may have unanticipated adverse consequences for the integrity of the justice system, and for its fair and regular operation." ABA 2006 Report with Recommendation #300 (Criminal Justice Section) at 3 (citing Robert

M.A. Johnson, *Collateral Consequences*, Message from the President, THE PROSECUTOR (National District Attorneys Association), May/June 2001).[12]

Where deportation is a potential consequence, competent defense counsel will identify the best available courses of action for the client, and will work with other systemic actors to shape a just outcome. The ABA Standards suggest the importance of this approach where the consequence of deportation may be disproportionate to the culpable behavior:

> [A] plea deal that might otherwise seem attractive – for example, a suspended one-year sentence for misdemeanor theft – may often look considerably different once it is determined that that plea would in fact be deemed an "aggravated" felony conviction leading to the alien client's swift deportation.

Pleas of Guilty Standard 14-1.4 cmt. at 58 n.96. In such a case, the defense lawyer might convince the prosecutor that justice would be better served by "a higher fine or more time in jail rather than a longer probationary period," so as to avoid deportability. Brian Bates, *Good Ideas Gone Bad: Plea Bargains and Resident Aliens*, 66 TEX. B.J. 878, 882 (2003). Where a client is considering the government's offer of a six-month jail sentence, the defense lawyer should counsel that the theoretical possibility of probation after trial is worth little if the defendant, because of her undocumented status, is unlikely to avoid

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[12] Available at www.abanet.org/leadership/2006/midyear under "Daily Journal." *See supra* note 9. Mr. Johnson's article is available from the National District Attorneys Association, at www.ndaa.org/publications/ndaa/toc_may_june_2001.html.

incarceration if convicted. Of course, the choice of which available course of action to pursue belongs to the client.

Because conviction has been a basis for deportation for nearly a century, immigration issues have historically been taken into account in the criminal process. Thus, for almost a century until 1990, state and federal sentencing judges could issue binding "Judicial Recommendations Against Deportation" ("JRAD") that would prevent deportation. Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L. J. 1131, 1143 (2002). Since JRAD relief was abolished in 1990, most jurisdictions have provided for notice of the possibility of deportation to defendants pleading guilty to criminal charges.[13] The location of the deportation may also be a consideration. *See, e.g.*, *United States v. Nam Hong*, No. 07-CR-172-S (01), 2009 WL 688610, paras. 15 & 16 (W.D.N.Y. Jan. 28, 2009) (Plea Agreement) (noting opportunity for defendant to fully determine consequences to his immigration status of conviction and the government's agreement not to oppose his request to serve sentence in Canada).

A. Immigration Status Can Affect Bail Decisions.

The ABA Standards require defense counsel to "take all necessary action to vindicate" defendant's rights, including "motions seeking pretrial release of

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[13] *See supra* note 10 and accompanying text.

the accused." Defense Function Standard 4-3.6. The petitioner in the present case was held without bond before trial "because he was suspected of being an illegal alien." *Padilla*, 253 S.W.3d at 483. However, petitioner claimed that the record showed that he was a legal permanent resident. *Id.* at 484.

Some states provide by statute for mandatory or discretionary denial of bail in consideration of undocumented immigration status. *See, e.g.*, Ariz. Const. Art. II, § 22(a)(4) (bail prohibited for those who entered or remained in the United States illegally "if the proof is evident or the presumption great as to the present charge"); 725 Ill. CSA 5/110-5(a) (factors for setting bail include whether a non-citizen was lawfully admitted or is deportable); Va. Code Ann. § 19.2-120.1 (presumption of denial of bail for certain illegal aliens). In other states, immigration status is a consideration in a court's balancing of factors. *E.g.*, *Ex parte Rodriguez*, No. 01-03-00550-CR, 2004 WL 1234001, at *3 (Tex. Ct. App. June 1, 2004) (quantity of drugs seized weighed with factors that included defendant's undocumented alien status in denying reduction of bond). Thus, a rule that defense counsel need never consider a client's immigration status could result in detention without bail or release with higher bail, based on mistakes about the client's legal status.

B. Immigration Status Can Affect Charges and Plea Bargains.

Defense counsel's consideration of the possible immigration consequences of conviction can affect prosecutorial charging decisions. Where defense counsel advises a prosecutor that the defendant will be deported if convicted, the prosecutor may choose

not to bring charges or to defer prosecution. *See, e.g.*, Pleas of Guilty Standard 14-4.1 cmt. at 146 (diversion may be appropriate based on "special characteristics or difficulties of the offender") (citing NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS, Standard 44.4(b) (2d ed. 1991)). *See also, e.g.*, NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS at Standard 43.6(1) (prosecutor should exercise discretion and file only charges considered to be consistent with interests of justice, which include "undue hardship to the accused").

The effects on victims, the community, and individuals should also be considered. For example, in 2001, the then-president of the National District Attorney's Association wrote, "Judges often consider the collateral consequences of a conviction" and prosecutors also "must consider them if we are to see that justice is done." He explained:

> This struggle for justice was evident in the mind of a highly respected district attorney in a major jurisdiction when he shared his agony in deciding the fate of a father who abused his child. This father, after all, would be deported upon conviction, destroying a family that the district attorney and the victim's family thought could be saved.

Robert M.A. Johnson, *Collateral Consequences*, *supra*, at 15 and n.12.[14]

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[14] Prosecutors may also consider lesser charges, diversion, or non-prosecution to allow offenders to avoid deportation. *See also* Karen E. Crummy, *Deportations Avoided Via Plea Deals*, Denver Post, Oct. 1, 2006.

On the other hand, Congress has specifically authorized stipulation to deportability as part of plea bargains. 8 U.S.C. §1228(c)(5). Prosecutors sometimes agree that consent to deportation warrants a downward departure. *United States v. Bernal-Castillo*, 2007 WL 4818673, Para. 10 (N.D. Ohio June 20, 2007) (Plea Agreement) (in exchange for defendant's agreement not to contest deportation/removal, United States agreed that a one (1) level downward departure from Sentencing Guidelines was justified under U.S.S.G. § 5K2.0).

In state courts also, defense counsel may advise the client to agree not to contest deportation in exchange for a plea to a lesser charge, dismissal of counts, or imposition of a reduced prison term. *See People v. Antonio-Antimo*, 29 P.3d 298 (Colo. 2000) (defendant received sentence of probation and release to INS for deportation hearing); *State v. Rodriguez*, 45 P.3d 541, 547 (Wash. 2002) (witness pleaded guilty because prosecutor agreed to recommend deportation instead of jail sentence).

Where charges cannot be avoided but deportation is not inevitable, defense counsel can sometimes advance the client's interests by negotiating a plea to a different charge, or one requiring more incarceration. *See* Pleas of Guilty Standard 14-3.1(c) ("The prosecuting attorney, in considering a plea agreement, may . . . (iv) enter an agreement with the

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(http://www.denverpost.com/counties08/ci_4424481); Jennifer Emmons, *Crane Suspect Gets Five Years Probation*, El Defensor (N.M.) Chieftain, Mar. 5, 2005 (http://www.dchieftain.com/news/49261-03-05-05.html); Peter Shinkle, *New Plea Helps Man Avoid Deportation*, St. Louis Post-Dispatch, Dec. 11, 2004, at 13.

defendant regarding the disposition of related civil matters. . . including civil penalties and/or civil forfeiture"); *People v. Bautista*, 8 Cal. Rptr. 3d 862, 870 & n.8 (Ct. App. 2004) (in ineffective assistance of counsel claim, court considered expert's declaration that techniques used to defend against adverse immigration consequences include pleading to different but related offense, 'pleading up' to a nonaggravated felony even if the penalty is stiffer, and obtaining disposition of 364 days instead of 365 days.). One day's difference in the sentence may have significant legal effect: for certain offenses, a term of imprisonment of less than a year will not be a conviction for an aggravated felony, which has significant immigration consequences under 8 U.S.C. § 1101(a)(43)(F) and (G). See also *United States v. Andino*, 148 Fed. Appx. 828, 829-30 (11th Cir. 2005) (sentence of 364 days for robbery not aggravated felony under Section 1101(a)(43)(F)). While a person sentenced to 364 days in the federal system normally serves more time than a person sentenced to a year and a day, because sentences of a year or less do not earn the 54-day reduction provided in 18 U.S.C. § 3624(b), a low-level offender can trade serving more time for the possibility of avoiding deportation.

C. Immigration Status Can Affect Sentencing.

Defense counsel can also use deportation and other immigration consequences of conviction to influence the sentence to be imposed by the judge. The ABA Standards contemplate an important role for defense counsel at the sentencing stage, including developing facts and making arguments within the law that would support reducing the sentence

imposed. Thus, Defense Function Standard 4-8.1 provides:

> (a) Defense counsel should . . . be or become familiar with all of the sentencing alternatives available to the court . . . [and] with the court's practices in exercising sentencing discretion, the practical consequences of different sentences, and the normal pattern of sentences for the offense involved, including any guidelines applicable at either the sentencing or parole stages. The consequences of the various dispositions available should be explained fully by defense counsel to the accused.
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> (b) Defense counsel should present to the court any ground which will assist in reaching a proper disposition favorable to the accused.
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> . . .

Defense counsel may request courts to amend a judgment on a guilty plea to avoid deportation, and courts are sometimes willing to do so. *Commonwealth v. Gevorgiyan*, No. 2003-CA-002743-MR, 2005 WL 1125194, at *1 (Ky. Ct. App. May 13, 2005) (affirming lower court's retroactive designation of a felony drunk driving and endangerment conviction as a misdemeanor, which was requested "so that [defendant] would not be subject to immediate deportation.").[15]

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[15] It is noted that the dissent argued that defendant's claim should have been evaluated on an ineffective assistance of counsel theory, opining, "A blanket rule precluding an ineffective assistance of counsel claim where the attorney has failed to inform a defendant of possible immigration consequences does

Other courts have likewise considered the possibility of deportation in fashioning sentences. *State v. Tinoco-Perez*, 179 P.3d 363, 365 (Idaho Ct. App. 2008) (because deportation "is often a very significant consequence for the defendant . . . the effect [of conviction] on immigration status is an appropriate consideration for a trial court in fashioning a sentence"); *State v. Svay*, 828 A.2d 790, 791 (Me. 2003) ("defendant's immigrant status and the effect that criminal convictions and criminal sentences can have on deportation are factors that a sentencing court can consider"); *People v. Ping Cheung*, 718 N.Y.S.2d 578 (Sup. Ct. 2000) (resentencing to avoid deportation); *Ochoa v. Bass*, 181 P.3d 727, 731 (Okla. Crim. App. 2008) ("[W]here the sentencing judge has discretion in what sentence will be imposed, citizenship status is a circumstance that may affect the sentencing"); *State v. Quintero Morelos*, 137 P.3d 114 (Wash. Ct. App. 2006) (affirming reduction of sentence to less than a year to prevent deportation). *But see, e.g., People v. Mendoza*, 90 Cal. Rptr. 3d 315 (Ct. App. 2009) (trial court may not resentence to 364 days after term completed, where defendant had understood immigration consequences of plea); *State v. Kebaso*, 713 N.W.2d 317, 324 n.7 (Minn. 2006) ("we leave resolution of [the question whether a court may consider immigration consequences in criminal sentencing] for another day").

Federal courts imposing sentence can downwardly depart based on a defendant's agreement not to contest deportation. *United States v. Ramirez-*

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not allow for the kind of case-by analysis that the *Strickland* test envisions." *Id.* at *4 (Johnson, J., dissenting).

Marquez, 372 F.3d 935, 938-39 (8th Cir. 2004) (citing cases from several circuits). Of course, they need no authority to assign a sentence within, but at the lower end of, a range.

Defense counsel can also urge sentencing courts, when fashioning a sentence, to consider immigration-related consequences other than deportation that can result in a punishment more severe than would be received by a citizen, such as disentitlement to serving any part of a sentence in a halfway house or a minimum security prison. *See, e.g., United States v. Guzman*, 236 F.3d 830, 834 (7th Cir. 2001) (status as deportable alien "is relevant only insofar as it may lead to conditions of confinement, or other incidents of punishment, that are substantially more onerous" than framers of guidelines contemplated in fixing punishment range). *See generally* Nora V. Demleitner, *Terms of Imprisonment: Treating the Non-citizen Offender Equally*, 21 FED. SENT. RPTR. 174 (2009) (non-citizens ineligible for residential drug treatment carrying one-year sentence reduction under 18 U.S.C. § 3621(e)(2)(B)).

As authorized by Congress, state and federal prisoners may be eligible for early discharge and deportation, shortening their term of incarceration because of their immigration status. 8 U.S.C. § 1231(a)(4)(B); Ariz. Rev. Stat. § 41-1604.14(A); Cal. Penal Code § 3082; Ct. Gen Stats. §§ 54-125d, 54-130b; Rev. Code Wash. § 9.94A.685. Defense counsel may also move a court to recommend a prisoner's transfer to his home country pursuant to treaty and the Transfer of Offenders To and From Foreign Countries Act, 18 U.S.C. §§ 4100-4115. *Cf. Aujla v. U.S. Dept. of Justice*, No. 1:CV-06-1668, 2007 WL

1074469 (M.D. Pa. Apr. 5, 2007) (Attorney General has discretion under Act to approve or disapprove transfers of convicted foreign nationals).

Defense counsel should also be aware of a client's immigration status because many courts consider undocumented status or the likelihood of deportation as reasons to deny otherwise available sentences of probation. *E.g., People v. Espinoza*, 132 Cal. Rptr. 2d 670 (Ct. App. 2003) (probation under Proposition 36 denied because deportation made it impossible for defendant to complete drug treatment program); *People v. Hernandez-Clavel*, 186 P.3d 96, 99-100 (Colo. Ct. App. 2008), *cert. granted*, 2008 WL 2580193 (Colo. June 30, 2008) (discussing cases in which probation denied, on bases that include defendant's undocumented status as evidence of unwillingness to obey the law and as resulting in inability to comply with terms of probation).

Finally, defense counsel must anticipate that non-citizens charged with federal crimes may face deportation as part of the court-imposed sentence, since federal judges are authorized by law to issue orders of criminal deportation under 8 U.S.C. § 1228(c), and to make deportation a condition of probation under 18 U.S.C. § 3563(b)(21). This authority to order deportation tends to blur any distinction between direct and collateral consequences where deportation is concerned.

IV. REQUIRING DEFENSE COUNSEL TO UNDERSTAND AND ADVISE THE CLIENT ABOUT THE IMMIGRATION CONSEQUENCES OF A GUILTY PLEA DOES NOT IMPOSE AN UNREASONABLE BURDEN ON CRIMINAL DEFENSE LAWYERS.

The requirement under the ABA Standards to advise about immigration consequences is not an unreasonable burden on criminal defense lawyers: they have ready access to the information needed to advise their non-citizen clients competently because, for decades, this information has been a staple of professional writing for defense attorneys. *See, e.g.*, ROBERT MCWHIRTER, THE CRIMINAL LAWYER'S GUIDE TO IMMIGRATION LAW: QUESTIONS AND ANSWERS (ABA 2d ed. 2004); William R. Maynard, *Deportation: An Immigration Law Primer for the Criminal Defense Lawyer*, THE CHAMPION 12 (June 1999); Maryellen Fullerton, *Strategies for Ameliorating the Immigration Consequences of Criminal Convictions: A Guide for Defense Attorneys*, 23 AM. CRIM. L. REV. 425 (1986); David F. Aberson, *Deportation of Aliens for Criminal Conviction*, 2 PEPP. L. REV. 52 (1974). Defender offices and organizations in almost every state engage in training on immigration issues and designate lawyers to consult with colleagues when such issues arise, and bar and related professional organizations in most states sponsor publications and continuing legal education training regarding immigration and criminal defense.[16]

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[16] A survey of state bar and related professional organizations is provided in the Appendix.

Lack of knowledge about a category of facts that the legal system deems relevant to the judicial process, including charges and sentence, is inconsistent with the duty of competence contemplated by the ABA Standards and Model Rules. *See State v. Yanez*, 782 N.E.2d 146, 154-55 (Oh. Ct. App. 2002) (citing ABA Pleas of Guilty Standard 14-3.2(f); *St. Cyr*, 533 U.S. at 323 n.50; and *Strickland*, 466 U.S. at 668). As the *Yanez* court stated:

> [In Ohio courts,] competent counsel may successfully use the prospect of the defendant's deportation as a bargaining chip with the prosecution for reduction of the offense charged in return for a negotiated guilty plea. When unaware of the immigration consequences of a plea, defense counsel puts the defendant at risk of an actual sentence [that is] not consistent with sentences imposed for similar crimes committed by similar offenders.
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> . . . Unless defendant is aware of the risk of deportation, he cannot appreciate whether it is in his best interest to waive his rights by entering a guilty plea.

Yanez, 782 N.E.2d at 155 (internal quotation marks and citation omitted).

The Supreme Court of Kentucky nevertheless adopted a bright line *per se* rule that defense counsel need never consider immigration consequences when representing a client. This determination – that a matter of great importance in many cases need never be considered in any case – is inconsistent with the principle, reflected in the ABA Standards for Criminal

Justice and ABA Model Rules, that clients facing criminal charges are entitled to decide to waive or exercise constitutional rights based on knowledge of the legal consequences that are important to them. For non-citizen clients considering a guilty plea, knowledgeable decision-making requires that defense counsel understand and can competently advise them about the immigration consequences of the plea.

CONCLUSION

For the reasons set forth above, the ABA respectfully submits that the decision of the Supreme Court of Kentucky should be reversed, and the case remanded for a hearing on petitioner's Sixth Amendment claim.

Respectfully submitted,

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APPENDIX

EXAMPLES OF BAR-SPONSORED EDUCATIONAL RESOURCES CONCERNING IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS

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AMICUS CURIAE BRIEF

No. 08-651

IN THE

Supreme Court of the United States

FILED
JUN 2 - 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JOSE PADILLA,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR AMICI CURIAE ASIAN AMERICAN JUSTICE CENTER, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AND OTHER IMMIGRANTS' RIGHTS ORGANIZATIONS IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

No. 08-651

JOSE PADILLA,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

INTEREST OF AMICI CURIAE[1]

Amici are non-profit organizations that promote equality, justice, and civil rights for immigrants. The Asian American Justice Center (AAJC) is a non-partisan organization whose mission is to advance the human and civil rights of Asian Americans. AAJC works to promote civic engagement, forge strong and safe communities, and create an inclusive society on a local, regional, and national level. Collectively, AAJC and its affiliates, the Asian American Institute, Asian

[1] The parties have consented to the filing of this brief. Pursuant to Rule 37.3(a), letters consenting to the filing of this brief are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

Law Caucus, and Asian Pacific American Legal Center of Southern California, have more than 50 years of experience in litigation, public policy, advocacy, and community education.

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1968. Its principal objective is to promote the civil rights and equality of treatment of Latinos living in the United States. MALDEF's mission includes a commitment to pursuing political and civil equality and opportunity through advocacy, community education, and the courts. MALDEF therefore has an interest in the fair and predictable enforcement of the nation's criminal laws.

A list and description of additional amici are included in the appendix to this brief.[2] Those amici are organizations that, like AAJC and MALDEF, work directly with immigrant communities that are affected by the issues in this case.

This case addresses an issue of great importance to amici and many immigrants for whom they advocate: the extent to which non-citizen criminal defendants have a Sixth Amendment right to competent legal ad-

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[2] Additional amici are: Asian American Institute; Asian Law Alliance; Asian Law Caucus; Asian Pacific American Legal Center of Southern California; Boat People, SOS; Center for Pan Asian Community Services; Florida Immigrant Advocacy Center; Fred T. Korematsu Center for Law and Equality; National Asian Pacific American Bar Association; National Asian Pacific American Women's Forum; National Immigrant Justice Center; National Korean American Service and Education Consortium; North Carolina Justice Center; Organization of Chinese Americans; South Asian Americans Leading Together; Southeast Asia Resource Action Center; and Southern Coalition for Social Justice.

vice regarding the immigration consequences of accepting a guilty plea. Under current immigration law, if a non-citizen is convicted of any one of a wide array of offenses, including some relatively minor crimes, that non-citizen must be deported and must be detained pending removal proceedings. In addition, many such convictions can permanently bar those non-citizens from ever returning to the United States. Amici submit this brief to demonstrate the devastating real-life consequences that inadequate or erroneous legal advice in this context can have for immigrants and their families, many of whom are long-time legal permanent residents with family, jobs, and homes in the United States.

SUMMARY OF ARGUMENT

The United States is home to approximately 12.8 million legal permanent residents. Rytina, *Estimates of the Legal Permanent Resident Population in 2007*, at 1 (DHS Feb. 2009), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_pe_2007.pdf. Some came to the United States to join their families or were adopted as small children by American parents.[3] Others were sponsored by employers.[4] Still others sought refuge in the United States as they fled persecution and violence in countries such as Somalia, Iran,

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[3] In 2008, 716,244 family-sponsored immigrants became legal permanent residents. Monger and Rytina, *U.S. Legal Permanent Residents: 2008*, at 3 (DHS Mar. 2009), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2008.pdf.

[4] In 2008, 166,511 immigrants became legal permanent residents as a result of employment-based preferences. *Id.*

and Cambodia.[5] While their backgrounds and countries of origin vary, many legal permanent residents make America their home and establish roots in their communities, contribute to the economy as members of the workforce or as small business owners,[6] raise families, and join the military.[7]

Like United States citizens, non-citizens sometimes run afoul of the law. When non-citizens interact with the criminal justice system, they may face disadvantages as a result of language and cultural barriers. *See* National Asian Pacific American Legal Consortium, *Equal Justice, Unequal Access* (2005), *available at* http://www.advancingequality.org/files/equaljustice.pdf. That problem is compounded because under current immigration law, convictions for many types of relatively minor crimes result in mandatory detention and deportation. Indeed, since the effective date of the 1996 amendments to the Immigration and Nationality Act (INA), which expanded the scope of deportable offenses, the number of persons deported from the United States for criminal convictions has greatly increased. From 1998 to 2006, the total number of depor-

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[5] In 2008, 166,392 refugees and asylees became legal permanent residents. *Id.*

[6] *See* Batalova and Dixon, *Foreign-Born Self-Employed in the United States* (Migration Policy Institute Apr. 2005), *available at* http://www.migrationinformation.org/USFocus/display.cfm?ID=301.

[7] According to the United States Army, roughly 8,000 non-citizens enlist in the United States military each year. *See* McIlvaine, *U.S. Immigration Reaches out to Military Soldiers and Spouses* (May 2005), *available at* http://www.army.mil/-news/2009/05/05/20610-us-immigration-reaches-out-to-military-soldiers-and-spouses/.

tations for criminal convictions rose from 72,482 to 103,163 annually. Human Rights Watch Report, *Forced Apart* 19 (Apr. 2009), *available at* http://www.hrw.org/sites/default/files/reports/us0409web.pdf. The vast majority of those deportations were for non-violent crimes. *Id.* at 33.

Because detention and deportation tear apart families and disrupt long-settled expectations, for many non-citizens, the immigration consequences of a particular conviction are the most important consideration in deciding whether to accept a guilty plea. As the real-world accounts in Part I of this brief demonstrate, however, without understanding the potential immigration consequences of a given plea, a non-citizen often cannot make a fully informed decision whether to accept a plea agreement. By contrast, as the examples in Part II demonstrate, in many cases where defense attorneys have provided such advice to non-citizen clients, those clients have been better able to make fully informed decisions about whether to accept a plea or go to trial. Defense counsel therefore should ensure that a non-citizen client considering a guilty plea understands the full extent of the immigration consequences that can flow from accepting that plea. *See Strickland* v. *Washington*, 466 U.S. 668, 688 (1984) (recognizing that defense counsel owes a client "certain basic duties," including "the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution"); *see also Hill* v. *Lockhart*, 474 U.S. 52 (1985) (extending *Strickland* to the plea context).

ARGUMENT

I. Because The Immigration Consequences Of Criminal Convictions Can Be Extremely Serious, Avoiding Those Consequences Can Be The Most Important Consideration For Non-Citizens In Determining Whether To Accept A Particular Guilty Plea

A. Immigration Law Imposes Harsh Consequences For Convictions Classified As Aggravated Felonies Or Otherwise Leading To Mandatory Detention And Deportation

Although courts have often characterized the immigration consequences of a guilty plea as "collateral" effects, the 1996 amendments to the INA rendered the immigration consequences of convictions for many crimes more certain, immediate, and severe. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, tit. IV, 110 Stat. 1214; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009, 3009-546. Under the amended law, convictions for many relatively minor state-law crimes that previously were not deportable offenses—or were offenses that carried immigration consequences from which courts had discretion to grant relief on a case-by-case basis—now result in mandatory detention and deportation. Without accurate information about how the INA classifies a particular crime, therefore, a non-citizen considering whether to plead guilty to a minor crime in exchange for a lighter sentence risks accepting a plea deal that has the unintended consequence of detention and, in many cases, permanent banishment from the United States.

1. A conviction for a crime classified as an aggravated felony results in mandatory deportation for non-citizens

The INA requires deportation of non-citizens who have been convicted of a crime qualifying as an "aggravated felony." 8 U.S.C. § 1227(a)(2)(A)(iii). A conviction for such an offense virtually mandates that the non-citizen will be deported because immigration judges no longer have discretion to grant relief in such cases. *Id.* § 1229b(a)(3) (excluding aggravated felons from the category of non-citizens eligible for cancellation of removal).[8] Persons convicted of aggravated felonies and sentenced to a term of at least five years of imprisonment also become ineligible for withholding of removal. *Id.* § 1231(b)(3)(B).[9] In general, non-citizens

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[8] Deportation is also mandatory for a non-citizen convicted of other crimes that qualify as deportable offenses under 8 U.S.C. § 1227(a)(2), if that non-citizen has not resided in the United States for a specified number of years. *See id.* § 1229b(a)(1)-(2).

[9] Only in extraordinary circumstances can a conviction for an aggravated felony not lead to mandatory deportation. For example, non-citizens convicted of aggravated felonies who can show that they will be subject to torture if deported and non-citizens who were previously admitted as refugees or asylees because of a well-founded fear of persecution might qualify for relief under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 (entered into force June 26, 1987). *See* Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, div. G, tit. XXII, § 2242, 112 Stat. 2681, 2681-822 (codified at 8 U.S.C. § 1231 note). Non-citizens allowed to remain under those exceptions, however, remain subject to deportation at any time and are no longer eligible for adjustment of status to that of legal permanent resident. *See* 8 C.F.R. §§ 208.16-.17; 8 U.S.C. § 1159(b)-(c). Although such relief is available, it is rarely granted, and non-citizens have been denied such relief even

convicted of aggravated felonies are also permanently barred from reentering the country once deported. *Id.* § 1182(a)(9)(i). Additionally, a conviction for an aggravated felony serves as a bar to naturalization. *See id.* § 1427(a) (to qualify for naturalization, a non-citizen must be a person of "good moral character"); *id.* § 1101(f)(8) (a person convicted of an aggravated felony shall not be found to be a person of "good moral character").

By broadening the definition of "aggravated felony," the 1996 amendments to the INA greatly expanded the scope of convictions that subject a non-citizen to such mandatory deportation. The INA's current definition of "aggravated felony" includes 21 categories of qualifying offenses, many of which have their own subcategories. 8 U.S.C. § 1101(a)(43). Under that expanded definition, convictions for many relatively minor crimes have been treated as "aggravated felonies." *See, e.g.*, Dugger, *After Crime, She Made a New Life, but Now Faces Deportation*, N.Y. Times, Aug. 11, 1997, at A8 (telling the story of Xuan Wilson, a legal permanent resident since age four, who faced deportation to Vietnam as an aggravated felon after being convicted of forging a check for $19.83). Indeed, in some cases, even convictions for crimes classified as misdemeanors under state law have been treated as aggravated felonies for immigration purposes. *See, e.g.*, *United States* v. *Graham*, 169 F.3d 787 (3rd Cir. 1999);

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in the face of deportation to countries where human rights violations are rampant. *See infra* n.10 (describing cases in which courts have rejected requests for CAT relief from Haitian immigrants, notwithstanding the certainty of detention in Haitian prisons with horrendous conditions akin to those of a "slave ship").

United States v. *Pacheco*, 225 F.3d 148 (2d Cir. 2000); *cf.* Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 Harv. L. Rev. 1936, 1939 (2000) (some courts have interpreted the definition such that "a crime need not be either aggravated or a felony" to qualify as an aggravated felony).

For instance, the scope of the aggravated felony provision has been held to

> include[] such offenses as misdemeanor theft of a video game, valued at approximately $10; the sale of $10 worth of marijuana; breaking into an Alcoholics Anonymous meeting in 1968 and drinking a bottle of wine with friends; one woman pulling the hair of another during a fight over a boyfriend; or shoplifting $15 worth of baby clothes.

Shortfalls of the 1996 Immigration Reform Legislation: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary, 110th Cong. 33 (2007) (prepared statement of Paul Virtue, former INS Commissioner); *see also Yong Wong Park* v. *U.S. Att'y Gen.*, 472 F.3d 66, 71-72 (3d Cir. 2006) (holding that Yong Wong Park, a legal permanent resident convicted of selling counterfeit clothing, was deportable for having been convicted of an aggravated felony).

2. Convictions for many classes of crimes subject non-citizens to mandatory detention

The 1996 amendments to the INA also greatly expanded the categories of convictions that subject non-citizens to mandatory immigration detention, even af-

ter completion of their criminal sentences. The law requires non-citizens convicted of specified crimes to be detained during their deportation or relief proceedings. 8 U.S.C. § 1226(c)(1); *see also Demore* v. *Kim*, 538 U.S. 510 (2003). Some non-citizens subject to that provision are detained in immigration facilities operated by private contractors or the federal government; others are detained in state or county prisons alongside inmates. *See* Amnesty International, *Jailed Without Justice* 3 (Mar. 25, 2009), *available at* http://www.amnestyusa.org/uploads/JailedWithoutJustice.pdf. The conditions of confinement for non-citizens can be similar to—and often worse than—the conditions for criminal inmates. *Id.*; *see infra* Part I.B.4.

Mandatory detention is the consequence of convictions for a wide variety of crimes. For example, the INA mandates detention for non-citizens in the United States charged with being removable after having been convicted of, among other things, an aggravated felony, two crimes involving moral turpitude, a firearms offense, or a controlled substance violation. 8 U.S.C. § 1226(c). Like the definition of aggravated felony, the definitions of many of the other crimes for which detention is mandatory can encompass a number of surprisingly petty offenses. For instance, under the INA's moral turpitude provision, non-citizens have been detained for such offenses as evading subway fares, *see* Bernstein, *Post-9/11, Even Evading Subway Fares Can Raise the Prospect of Deportation*, N.Y. Times, Oct. 11, 2004, at B1; stealing a $7 bottle of medicine for a sick child, *see* INS Record of Sworn Statement in Admin. Proceeding 4-5, *In re Calvillo* (June 18, 2007); and various other petty misdemeanors involving theft or intent to defraud, *see In re Pinlac-Abraham*, 2009 WL 331223 (BIA Jan. 22, 2009) ("Theft offenses have

long been held to involve moral turpitude."). In addition, convictions for possession of small amounts of drugs for personal consumption can subject a person to mandatory detention. *See* 8 U.S.C. § 1226(c)(1)(B).

3. Whether a non-citizen's acceptance of a guilty plea will lead to detention or deportation often turns largely on the specifics of the plea agreement

Because the INA's reach is exceedingly broad, non-citizens may plead guilty to minor crimes in exchange for a lighter sentence without realizing that they are pleading guilty to crimes that will subject them to mandatory deportation or, at a minimum, detention akin to imprisonment. Whether immigration law classifies a particular criminal conviction as one that results in detention or deportation, however, can turn largely on the specifics of a non-citizen's plea agreement. For instance, a plea to shoplifting with a one-year suspended sentence, for which the defendant serves no time in prison, results in mandatory detention and deportation. In contrast, a plea to the same crime with a sentence of six months of actual prison time does not have immigration consequences. *See* 8 U.S.C. § 1101(a)(43)(G) (a "theft offense ... for which the term of imprisonment [is] at least one year" qualifies as an aggravated felony) (footnote omitted); *id.* § 1101(a)(48)(B) ("[a]ny reference to a term of imprisonment" in the INA includes suspended sentences). Therefore, because the immigration consequences of pleading guilty can be so severe—and because the specifics of the plea agreement are so important—it is crucial that non-citizens be fully aware of those relevant considerations before accepting a plea.

B. Deportation And Detention, Which Are Often Consequences Of Criminal Convictions For Non-Citizens, Can Severely Disrupt Settled Expectations, Wreak Havoc On An Individual's Life, And Tear Families Apart

For many non-citizens facing criminal prosecution, the most important consideration in deciding whether to accept a guilty plea is the effect that the decision will have on their ability to remain in the United States with their families. Indeed, this Court has long recognized that

> [t]he impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence. A deported alien may lose his family, his friends and his livelihood forever. Return to his native land may result in poverty, persecution and even death.

Bridges v. *Wixon*, 326 U.S. 135, 164 (1945); *see also Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922) (deportation "obviously deprives [a person] of liberty. ... It may result also in loss of both property and life, or of all that makes life worth living").

As the following accounts make clear, that risk is not merely hypothetical. Deportation and detention can tear apart families, some of whom have lived legally in the United States for decades, and can "shatter[] the life [they have] built in America." *Atkinson* v. *United States*, 2009 WL 900067, at *5 (N.D. W. Va. Mar. 31, 2009). Deportation and detention also can separate non-citizens from their livelihoods and businesses. Moreover, deportation can send non-citizens back to the countries from which they fled violent persecution. And even non-citizens who are subject to mandatory

detention but who are not ultimately deported suffer serious familial and personal consequences. Because the potential consequences of accepting a guilty plea can result in devastating outcomes,[10] a non-citizen should understand those consequences in order to make a truly knowing and voluntary guilty plea.

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[10] Indeed, in some cases, non-citizens—after completing their criminal sentences and serving time in immigration detention in the United States—may be deported to countries that incarcerate deportees in horrendous conditions upon their arrival.

For example, the Haitian government detains all Haitian citizens who have been deported from the United States because of past criminal convictions. *Auguste* v. *Ridge*, 395 F.3d 123, 129 (3d Cir. 2005). The conditions of confinement in Haitian detention facilities have been described as "reminiscent of a slave ship." Delt, *Mother of Two, Deported to Haiti, Dies in Haitian Jail*, Haïti Progrès, Sept. 27, 2000, *available at* http://www.haiti-progres.com/2000/sm000927/XENG0927.htm (last visited Apr. 3, 2009). Haitian deportees are often detained "in cells that are so tiny and overcrowded that prisoners must sleep sitting or standing up, and in which temperatures can reach as high as 105 degrees Fahrenheit during the day." *Auguste*, 395 F.3d at 129. Many of those cells "are full of vermin" and "lack basic sanitation facilities, ... leaving the floors covered with urine and feces." *Id.* Detained deportees also lack access to basic medical care, which, combined with the unsanitary conditions of the facilities, can lead to illness or death. *Mother of Two, Deported to Haiti, Dies in Haitian Jail*, *supra* (telling the story of Claudette Etienne, who was deported from the United States and died in a Haitian detention facility after drinking the tap water).

Despite the Haitian government's practice, many courts have rejected Haitian nationals' requests for relief under the CAT, 8 U.S.C. § 1231 note. *See, e.g.*, *Auguste*, 395 F.3d at 154 (holding that non-citizen awaiting deportation to Haiti did not qualify for CAT relief even though "[t]he conditions that [he] will likely face in Haiti's prisons, like those awaiting many other criminal deportees, are harsh and deplorable").

1. Deportation and detention separate families

Deportation often has devastating consequences for families, particularly families of legal permanent residents who have resided in the United States for many years. In addition, many non-citizens subject to mandatory detention are detained hundreds of miles away from their homes, separating families for months or even years.

The case of Maria Taganeca illustrates how much is at stake when a lawyer fails to pay attention to the immigration consequences of a plea agreement. Taganeca, a native of Fiji, came to the United States with her family at age seven. She was admitted as a legal permanent resident, and she and her entire family have resided lawfully in the United States since 1987. *In re Taganeca*, No. A40 106 555, Application for Cancellation of Removal, Ex. A, 1 (Exec. Office for Immigr. Review Jan. 26, 2006).

Taganeca grew up in Missouri and maintained strong ties with her family. *In re Taganeca*, Application for Cancellation of Removal, Ex. A, at 1-2. She graduated from high school, enrolled in community college, and held a series of steady jobs, including employment as a restaurant cook. *Id.* She was the primary caregiver for her elderly mother, who suffered from diabetes and renal failure in addition to being wheelchair bound. *Id.* Taganeca also cared for her father, who had a history of chronic illness, and her uncle, who had throat cancer. She was involved in her community, running errands for neighbors and coaching a children's swim team. *Id.*

In 2006, Taganeca was arrested when she was driving with some friends, one of whom had drugs in his possession. Although she did not have drugs on her

person, she was charged under Missouri law with possession of a controlled substance with intent to deliver. *In re Taganeca*, Application for Cancellation of Removal, Exs. G-I. Her attorney advised her to plead guilty, without accurately informing her that accepting such a plea could render her deportable. *In re Taganeca*, No. A40 106 555, Removal Proceedings, Resp. Br. 3 (BIA Dec. 21, 2006).

Taganeca was sentenced to a term of probation, but the offense to which she pleaded guilty qualified as a "drug trafficking crime," and therefore an aggravated felony, pursuant to 8 U.S.C. § 1101(a)(43)(B). Immigration and Customs Enforcement (ICE) subsequently detained her and initiated removal proceedings. Because the crime was an aggravated felony, Taganeca was not eligible for cancellation of removal. *See* 8 U.S.C. § 1229b(a)(3). She therefore faced almost certain deportation to Fiji, which would have uprooted her life in the United States, left her elderly parents and uncle without a caregiver, and sent her to a country where she had weak roots and very little family. *In re Taganeca*, Application for Cancellation of Removal, Ex. A, at 2. Taganeca feared the effect that deportation would have on her family, explaining, "I'm not much of a daughter, sister or Aunty ... being deported from my family." *Id.*

Taganeca subsequently filed for post-conviction relief on the grounds that her attorney's assistance was ineffective and that her plea was not knowing or voluntary because her attorney did not accurately advise her that pleading guilty to the drug-trafficking offense would result in her deportation. The court granted relief, vacated her conviction, and allowed her to plead guilty to simple possession. Although Taganeca was spared deportation, she was subject to many months of

detention, during which she could not care for her chronically ill family members. Moreover, if this Court rules that counsel has no duty to provide accurate advice in a circumstance such as Taganeca's, then relief of the sort Taganeca was fortunate enough to receive will no longer be available.

2. Deportation and detention separate non-citizens from their livelihoods

Many non-citizens come to the United States with the hope of achieving a better economic future for themselves and their families. To that end, some build and run their own businesses. Indeed, the most recent census revealed that roughly 1.4 million foreign-born individuals in the United States were self-employed. *Foreign-Born Self-Employed in the United States*, *supra*.[11] Deportation and detention, however, can separate non-citizens from their businesses and careers. *See, e.g.*, Ojito, *Immigrant Fights Off His Deportation*, N.Y. Times, Sept. 4, 1998, at B3 (describing the case of Jesus Collado—a long-time legal permanent resident, restaurant owner, and father of three children—who was detained for seven months pending relief proceedings, "almost lost his restaurant" while in detention, and owed $13,000 in back bills and $36,000 in back rent upon his release).

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[11] *See also* Immigrant Learning Center, *Economic Contributions of Immigrants Through Entrepreneurship*, *available at* http://www.ilctr.org/news/pdf/imm_entrepreneurs.pdf (last visited May 31, 2009) (noting that every census from 1880 through 1990 showed "that immigrants are more likely to be self-employed than natives" and describing "immigrant entrepreneurs as engines for economic growth in urban areas and centers of innovation").

For instance, Martin Medel, a legal permanent resident, came to the United States from Mexico in 1990. Mem. of Law in Support of Pet. for Writ of Mandamus 3, *Medel* v. *Head*, No. Civ. 09-1-3334-33 (Ga. Super. Ct., Cobb County Apr. 9, 2009). Medel built a life in Georgia, where he married, bought a home, and had three children who are United States citizens. In addition, Medel started a successful subcontracting business. One of his business associates has described him as "a model husband, father, and businessman who represents the ideal individual that we, as American citizens, should embrace and expect in our country." Letter from Jason R. Wagner, Feb. 5, 2009.[12] Another business associate, who has had a business relationship with Medel's subcontracting company for eleven years, explained Medel's devotion to his business: "Martin Medel is one of the finest men I've ever met. I've found him to be utterly honest and dependable. Martin runs a very successful business. ... He sets the example by working harder than anyone else. We consider him a major asset." Letter from Leonard A. D'Orlando, Jr., Feb. 5, 2009.[13]

While driving one night in 1999, Medel was pulled over. Upon searching his pockets, police found a dollar bill coated with trace amounts of cocaine. Aff. of Martin Medel Mejia, Mar. 24, 2009.[14] Medel, who had no prior criminal record, was charged with violating the Georgia Controlled Substances Act for possessing less

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[12] This document is on file with counsel for amici and is available at the Court's request.

[13] *See supra* n.12.

[14] *See supra* n.12.

than one gram of cocaine. Mem. in Support of Pet. for Writ of Mandamus 4-7. In exchange for pleading guilty pursuant to the Georgia First Offender Act, he was offered no jail time, conditioned on the successful completion of a term of probation. *Id.* The plea agreement also contained a promise that, should he successfully complete probation, Medel would not have a criminal record or an adjudication of guilt under state law. *Id.* Relying on advice from his counsel that such a plea would not affect his immigration status, Medel accepted the plea and was sentenced to a term of probation. *See id.*; Medel Aff. Medel successfully completed probation, fulfilled the terms of the plea agreement, and had no further problems with the law. Mem. in Support of Pet. for Writ of Mandamus 8.

In February 2009, Medel traveled to Mexico to visit friends. Upon his return, ICE detained him in Texas and charged him as being removable under 8 U.S.C. § 1227(a)(2)(B) for having committed a controlled substance offense. *See* Pet. for Writ of Mandamus 8. He was immediately placed in a Texas detention facility pending his removal proceedings. Medel has asserted that, because of the impact on his life, family, and business, he would not have pleaded guilty had his lawyer accurately informed him that doing so could lead to deportation. Medel Aff. He remains in detention in Texas pending his deportation proceedings, far away from his family, home, and business in Georgia.

3. Deportation can send non-citizens back to the countries from which they fled persecution

Thousands of people fleeing persecution in their home countries are admitted to the United States each year. Indeed, in 2008 alone, 90,030 refugees became le-

gal permanent residents, as did 76,362 asylees. *U.S. Legal Permanent Residents: 2008*, at 3, *supra*. Deportation, however, can send such people back to the countries from which they fled, often to avoid oppression, torture, or death.

For example, in the 1970s and 1980s, the United States admitted roughly 145,000 Cambodian refugees fleeing genocide and persecution under the repressive Khmer Rouge regime. Sontag, *In a Homeland Far from Home*, N.Y. Times Magazine, Nov. 16, 2003, *available at* http://www.nytimes.com/2003/11/16/magazine/16CAMBODIA.html. Many of those refugees were children. Once in the United States, "[t]he Cambodian refugees ... were singularly ill equipped to adjust to America" because of their peasant backgrounds and the trauma they had experienced. *Id.* As a result, many Cambodian refugees who arrived as children "were left to fend for themselves" and ended up getting into legal trouble. *Id.*

Despite the fall of the Khmer Rouge, Cambodia's "human rights record remain[s] poor," U.S. Department of State, *2008 Human Rights Report: Cambodia* (Feb. 25, 2009), *available at* http://www.state.gov/g/drl/rls/hrrpt/2008/eap/119036.htm. Many Cambodians who have been convicted of deportable offenses, particularly those who fled to the United States as children, face deportation to a strange land where they have no relatives and whose language they do not speak. Unmacht, *A Bumpy Road Ahead for US Deportees to Cambodia*, Christian Science Monitor, Jan. 21, 2003, *available at* http://www.csmonitor.com/2003/0121/p08s01-wosc.html. Indeed, "[o]ne in seven returnees have never before set foot in Cambodia, because they were born in refugee camps in Thailand. Many don't speak Khmer, and almost none read or write the language. Cambodians of-

ten ostracize the newcomers because of their American mannerisms [and] dress." Stokes, *Between Two Nations*, Nat'l. J., Jan. 13, 2007, at 57.

One such refugee is Sokha Chhan, whose family fled the atrocities of the Khmer Rouge in 1979 out of fear that his father would be executed for having been a member of the opposition party. Decl. of Sokha Chhan, executed Feb. 18, 2009, *People* v. *Chhan*, No. F02906020-3, at 2 (Cal. Super. Ct., Fresno County). Chhan entered the United States as a refugee when he was thirteen years old and has been a legal permanent resident since 1983. *Id.* at 1.

Chhan and his family established a life in California. Chhan married, had five children, and served honorably in the United States Army Reserve. *See* Sokha Chhan Decl. 2. His job and all of his immediate family and friends are in the United States; he has not been back to Cambodia for nearly three decades. *Id.* Chhan, however, had problems with his ex-wife, who suffered from a serious gambling addiction and had violent tendencies. Decl. of Billie Kuoy "KC" Chhan, executed Mar. 9, 2009, *People* v. *Chhan*, No. F02906020-3, at 1 (Cal. Super. Ct., Fresno County). In 2002, Chhan got into a physical altercation with her and was arrested. *Id.* After consulting with a public defender, he pleaded no contest to two charges of domestic violence and was sentenced to 365 days of imprisonment and 36 months of probation. Sokha Chhan Decl. 3. The public defender did not inform Chhan that accepting such a plea would almost certainly lead to deportation, even though she "was aware that a sentence of 364 days instead of 365 days could make a difference for Mr. Chhan regarding his immigration status." Decl. of Julie Bower, Esq., executed Jan. 28, 2009, *People* v. *Chhan*, No. F02906020-3, at 4 (Cal. Super. Ct., Fresno County); *see*

8 U.S.C. § 1101(a)(43)(F) ("crime of violence ... for which the term of imprisonment [is] at least one year" is an aggravated felony) (footnote omitted). In addition, Chhan's attorney did not advise him that he could have attempted to pursue an agreement to serve a six-month sentence for each conviction, with the sentences to be served consecutively, which would not have rendered him deportable. *See* Decl. of Angela Junck, Esq., executed Mar. 6, 2009, *People* v. *Chhan*, No. F02906020-3, at 5 (Cal. Super. Ct., Fresno County).

Chhan completed his term of imprisonment and focused on caring for his children. In 2008, however, Chhan's ex-wife had a violent outburst and chased one of their children with a cleaver. Sokha Chhan Decl. 5. A court subsequently awarded Chhan sole custody of their five children, all of whom are under the age of eighteen. Order re Child Custody and Visitation, *Chhan* v. *Chea*, No. 08CEFL03650 (Cal. Super. Ct., Fresno County Oct. 20, 2008). In March 2009, ICE initiated removal proceedings against Chhan for his 2002 conviction and placed him in detention. KC Chhan Decl. 2. According to Chhan's sister, after Chhan was detained:

> My mother cried for days and his kids are extremely depressed in his absence. It is like they have been mute since he's been gone. I believe that while this news has been devastating for all of his five children, the youngest daughter is going to be the one who suffers the most. She cries herself to sleep every night. Sokha is loved by all of his kids and is a supportive father, both emotionally and financially. If Sokha is deported, it will tear our family apart.

Id. at 2.

Chhan's family is now faced with the prospect of losing their only provider and caregiver, and Chhan is faced with the prospect of being sent to a country from which he fled violent persecution 30 years ago. In light of those consequences, Chhan has stated that he would not have accepted the 2002 plea had he known that doing so would lead to his deportation. Sokha Chhan Decl. 2-3 (noting that he "would have been willing to plead to a different offense, even if it meant serving additional time in custody, if it meant avoiding mandatory deportation"). He remains in detention pending deportation proceedings.

4. Mandatory detention schemes cause non-citizens convicted of specified offenses to suffer serious consequences from prolonged detention even when they are not subject to mandatory deportation

Non-citizens convicted of certain crimes—for example, two crimes involving moral turpitude or one controlled substance offense—will be subject to mandatory detention even if they are eligible for relief from deportation. *See* 8 U.S.C. §§ 1226(c)(1)(B), 1229b. Because detention is mandatory following conviction in those cases, an uninformed non-citizen seeking to avoid substantial prison time may accept a guilty plea in exchange for a lighter sentence, only to be immediately arrested by ICE officials and detained. Last year alone, roughly half a million non-citizens were detained in "the rapidly growing patchwork of more than 500 county jails, profit-making prisons and federal detention centers" that ICE uses to house immigrants pending deportation or relief proceedings. Bernstein, *Immigrant Detainee Dies, and a Life Is Buried, Too*, N.Y. Times, Apr. 3, 2009, at A1.

Mandatory detention, even when deportation does not necessarily follow, can have devastating consequences for non-citizens and their families. Non-citizens subject to mandatory detention can remain detained for months or even years pending their deportation or relief proceedings. In addition, many non-citizens are detained in facilities far away from their homes and families, making visits from loved ones difficult if not impossible. ACLU of Massachusetts, *Detention and Deportation in the Age of ICE* 23-26 (Dec. 2008), *available at* http://www.aclum.org/ice/documents/aclu_ice_detention_report.pdf. ICE can transfer non-citizens in its custody to other facilities without notice or cause, and many times does so without informing the non-citizen's lawyer or family. *Id.* at 23.[15]

While in detention—often in state or federal prisons—many non-citizens experience unpleasant conditions, including excessive overcrowding and harsh treatment by prison officers. *See Detention and Deportation in the Age of ICE* 8, *supra*; *see also Jailed Without Justice* 7, *supra*. Moreover, non-citizens in immigration detention often have difficulty obtaining necessary medical care, leading to severe illness or even

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[15] *See also* DHS, OIG, *Immigration and Customs Enforcement's Tracking and Transfers of Detainees* 1 (Mar. 2009), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_09-41_Mar09.pdf ("At the time of transfer, Immigration and Customs Enforcement does not always provide detainees the name of the facility to which they are being sent. The Detainee Transfer Notification form was not properly completed for 143 of the 144 transfers we tested. Agency staff interviewed generally considered completing and providing copies of the transfer forms to detainees a low priority. Also the staff interviewed did not know that they were responsible for informing detainees' legal representatives of transfers.").

death. *See* Priest and Goldstein, *System of Neglect*, Wash. Post, May 11, 2008, at A1; Goldstein and Priest, *In Custody, In Pain*, Wash. Post, May 12, 2008, at A1 (describing the struggles of Yong Sun Harvill, a Korean immigrant detained pending deportation on the basis of a conviction for buying stolen jewelry, whose repeated requests for cancer treatment were denied); Miroff, *ICE Facility Detainee's Death Stirs Questions*, Wash. Post, Feb. 1, 2009, at C1 (describing the case of Guido Newbrough—a German citizen who had lived in Virginia since age six—who died in ICE detention from an untreated bacterial infection after his "requests for medical attention were ignored").[16] As one newspaper described it, non-citizen "detainees have less access to lawyers than convicted murderers in maximum-security prisons and some have fewer comforts than al-Qaeda terrorism suspects held at Guantanamo Bay, Cuba." *System of Neglect, supra.*

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[16] Indeed, between October 7, 2003, and February 7, 2009, at least 90 people died in immigration custody. *Immigrant Detainee Dies, supra.* Many of those people were relatively young and were denied necessary medical care despite repeated requests. *System of Neglect, supra* (43-year-old Yusif Osman died from cardiac arrest after repeatedly being refused treatment for chest pains); Bernstein, *Ill and in Pain, Detainee Dies in U.S. Hands*, N.Y. Times, Aug. 13, 2008, at A1 (34-year-old Hiu Lui Ng died of a fractured spine and cancer that had gone untreated despite numerous complaints of back pain and requests for medical treatment); Bernstein, *Few Details on Immigrants Who Died in U.S. Custody*, N.Y. Times, May 5, 2008, at A1 (52-year-old Boubacar Bah died of a skull fracture and multiple brain hemorrhages after falling in custody and being placed in solitary confinement instead of being taken to a hospital).

The experiences of Edna Borges and Andre Venant illustrate the heavy toll that mandatory detention can take on the lives of non-citizens and their families.

a. Born in Portugal, Edna Borges came to the United States with her parents at age two. Rhor, *Unwelcome Turn '99 Conviction Spurs Mother's Detention*, Boston Globe, Aug. 7, 2003, at B1. She grew up in Massachusetts. *See id.* In 1999, when she was a teenager, Borges was arrested twice for shoplifting clothing from a department store. Emery, *Conviction Flags Portuguese Mom for Deportation*, Standard-Times, Aug. 7, 2003, at A3, *available at* http://archive.southcoasttoday.com/daily/08-03/08-07-03/a03sr016.htm. Without being advised of the potential immigration consequences, Borges pleaded guilty to larceny and received a term of unsupervised probation. *See Unwelcome Turn '99 Conviction Spurs Mother's Detention, supra*; Crim. Dkt. No. 9959CR005767 (Mass. Dist. Ct., Quincy Sept. 20, 1999); Crim. Dkt. No. 9831CR1303 (Mass. Dist. Ct., Taunton Mar. 16, 1998). Although she was not detained then, she was required to check in periodically with ICE officials. *Conviction Flags Portuguese Mom for Deportation, supra.*

After her brush with the law, Borges turned her life around. *Unwelcome Turn '99 Conviction Spurs Mother's Detention, supra.* She became involved in a youth group, earned a vocational certificate from a local school, and started her own business. *Id.*; *Conviction Flags Portuguese Mom for Deportation, supra.* She did not commit any other crimes. *Id.*

When Borges was 22 years old, she gave birth to her second child. *Conviction Flags Portuguese Mom for Deportation, supra.* Eight days later, she checked in with ICE, which promptly placed her in detention

after determining for the first time that she was subject to mandatory immigration detention and possible deportation because her two shoplifting convictions constituted crimes involving moral turpitude. *Id.*; *Unwelcome Turn '99 Conviction Spurs Mother's Detention*, *supra*. After she was detained, her baby refused to feed from a bottle and became very ill. *See Conviction Flags Portuguese Mom for Deportation*, *supra*. In addition to being detained, Borges faced the prospect of deportation to Portugal, a country she had never known, and the threat of permanent separation from her new baby and the rest of her family. *Id.*

ICE initiated deportation proceedings, but Borges was eventually granted cancellation of removal as a result of her strong community ties and the media attention that her case attracted. *See Judge Orders Release of Immigrant Mother*, Boston Globe, Aug. 8, 2003, at B3. Had her attorney properly advised her of the immigration consequences of pleading guilty to the shoplifting charges in the first place, however, her detention and the resulting trauma to her family and children could have been avoided.

b. The story of Andre Venant also demonstrates how detention can adversely affect non-citizens' lives. Venant, a native of Madagascar, immigrated to the United States in 1981, hoping to find employment in the New York City restaurant industry. *See Post-9/11, Even Evading Subway Fares Can Raise the Prospect of Deportation*, *supra*. He became a legal permanent resident and worked in a series of well-known New York restaurants for nearly twenty years, starting off as a dishwasher and working his way up to cook. *Id.*

In 2003, however, Venant became ill with diabetes and was hospitalized for a broken leg after a fall. Soon

he was destitute and without a full-time job. Short of cash, Venant learned how to fold empty subway fare cards so that they displayed the $2 fare when swiped at the turnstile. *Post-9/11, Even Evading Subway Fares Can Raise the Prospect of Deportation, supra.* Venant used those cards to avoid paying the fare or sold them to other riders. He was arrested multiple times for misdemeanor MetroCard fraud, each time serving a sentence of less than seven days in jail. *Id.* Those convictions, however, rendered him deportable under 8 U.S.C. § 1227(a)(2)(A)(ii) and subject to mandatory detention pursuant to 8 U.S.C. § 1226(c)(1)(B) for having been convicted of multiple crimes involving moral turpitude.

ICE placed Venant in jail, and within days, he was transferred to a detention center in Louisiana, where he spent six months. *Post-9/11, Even Evading Subway Fares Can Raise the Prospect of Deportation, supra.* With a friend's help, he was able to obtain a lawyer and eventually received cancellation of removal. After his release from detention, Venant "returned to New York to find his identity in tatters: Rikers Island officials had destroyed his green card, driver's license and Social Security card, documents he needed to get work and medical care for diabetes." *Id.* Venant described mandatory detention as "a kind of kidnapping ... . It's like sending people to a desert island." *Id.*

II. When Defense Attorneys Accurately Inform Defendants About Immigration Consequences, Defendants Are Able To Make Informed Decisions About How To Plead And Whether To Go To Trial

Criminal defendants rely on their attorneys for advice about whether to plead guilty to an offense or ex-

ercise their right to go trial. For many non-citizens, the prospect of being deported or detained for a prolonged period may be far more important than the prospect of serving a longer prison sentence. However, such defendants can make a voluntary and intelligent decision about whether to enter into a plea bargain only when they are fully informed about the immigration consequences of the plea and of alternative courses of action.

As discussed above, examples of non-citizens who are deported or detained after accepting guilty pleas without being fully informed of the immigration consequences are legion.[17] As the following examples dem-

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[17] Other examples abound. A Virginia court held that Mohamed Wael's counsel was ineffective for erroneously advising Wael that pleading guilty to a grand larceny charge for shoplifting in exchange for a two-year suspended sentence would not lead to deportation. His conviction, however, qualified as an aggravated felony under the INA. The court noted that counsel's "misstatements removed any opportunity for Mohamed or his counsel to ask for a sentence that was slightly below the one year threshold so as to avoid the harsh immigration consequences that would follow." *Commonwealth* v. *Mohamed*, 2006 WL 2388632, at *2 (Va. Cir. Ct. Aug. 18, 2006).

The Ninth Circuit held that Kwok Chee Kwan's counsel was ineffective for inaccurately assuring Kwan that pleading guilty to bank fraud, which resulted in a sentence of one year and one day and thus qualified as an aggravated felony, was unlikely to lead to deportation. The court explained that Kwan could have pursued a number of other options that would not have affected his immigration status had he been fully informed of the potential consequences. Specifically, he "could have gone to trial or renegotiated his plea agreement to avoid deportation; he could have pled guilty to a lesser charge; or the parties could have stipulated that Kwan would be sentenced to less than one year in prison." *United States* v. *Kwan*, 407 F.3d 1005, 10017-1018 (9th Cir. 2005).

onstrate, however, non-citizens who receive accurate advice about the consequences of pleading guilty to certain offenses are better able to make informed decisions and exercise their rights accordingly. The non-citizens in these examples chose to plead guilty to one or more charges and were punished for those crimes; their lawyers' advice simply allowed them to plead guilty with a full understanding of their options and the potential immigration consequences of a guilty plea to each alleged offense.

A. Baindu Marian Mando

Baindu Marian Mando immigrated to the United States at the age of ten as a refugee from her home country, Liberia, which was experiencing a bloody civil war. Mot. for Downward Departure & for a Variance from the Advisory Guideline Range and Incorporated Sentencing Mem. 4, *United States* v. *Mando*, No. 06-cr-00018 (M.D. Tenn. Nov. 29, 2006). Because of the threat of political violence, Mando and her family had to flee their home, and she spent several years of her early childhood in refugee camps. *Id.* During that time, her father abandoned the family and her mother died of illness. *Id.* at 4-5. Mando ultimately immigrated to the United States with her uncle.

And a New York court held that Bruce McDonald's counsel was ineffective for wrongly advising McDonald that pleading guilty to sale of marijuana, an aggravated felony, would not result in deportation. In that instance, the prosecution's case against McDonald was weak, and he pleaded guilty only to avoid a long prison sentence, during which he would have been separated from his family. After McDonald was granted post-conviction relief on grounds of ineffective assistance of counsel, McDonald's case went to trial, and he was acquitted of all felony charges. Caher, *Tag Team of Lawyers Drawn to Alien's Plight*, 231 N.Y.L.J. 1 (2005).

Mando had a difficult childhood in the United States. Mot. for Downward Departure 6-7. She was raised by her uncle who sexually abused her. *Id.* at 8. When he subsequently abandoned her, she was taken into state custody. She spent her teenage years in various foster homes and residential placements. *Id.* She became pregnant at age 15 when an older man took advantage of her. *Id.* at 9. Mando suffers from Post-Traumatic Stress Disorder and depression as a result of the many traumas in her life. *Id.* at 6.

In 2006, Mando, then age 20, was arrested for allegedly attempting to rob a bank by passing a demand note to a teller through the bullet-resistant glass. Mot. for Downward Departure 1. The teller laughed and showed the note to the manager. Mando, who was unarmed, immediately left the bank and walked to the parking lot, where she was apprehended by the police. *Id.*

Mando's attorney was aware that Mando was a non-citizen and could face immigration consequences depending on her conviction. Letter from David Baker, counsel for Mando, May 28, 2009, at 1.[18] He consulted an immigration treatise and confirmed that she would necessarily be deported if she were convicted of robbery and sentenced to one or more years in prison. *Id.*[19] For Mando, avoiding deportation was the most

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[18] *See supra* n.12.

[19] Mando was charged with attempted bank robbery in violation of 18 U.S.C. § 2113(a). Although she had no weapon, any attempted bank robbery is considered a "crime of violence." Accordingly, a conviction of bank robbery with a term of imprisonment of at least one year is an aggravated felony under federal immigration law. 8 U.S.C. § 1101(a)(43)(F).

important consideration, not least because she had two young American children who depended on her to care for them and raise them. Returning to Liberia was unthinkable. Having fled Liberia as a child, Mando no longer had any family or connections in her home country and barely remembered her native tribal language. *Id.* at 2.

Mando and her attorney considered her options, which included: (1) negotiating a plea to a misdemeanor such as bank larceny; (2) accepting the attempted robbery plea and seeking a downward departure from the sentencing judge; or (3) going to trial. Given the government's unwillingness to negotiate a plea to a lower offense and the risk of a significantly higher sentence if Mando did not prevail at trial, she concluded that her chances of avoiding deportation were better if she accepted the attempted robbery plea and persuaded the judge to lower her sentence to less than one year. Baker Letter 2.

Mando pleaded guilty to attempted bank robbery in violation of 18 U.S.C. § 2113(a) and moved for a downward departure. Plea Agreement, *United States* v. *Mando*, No. 06-cr-00018 (M.D. Tenn. Sept. 22, 2006). In addition to advising the judge of the many mitigating circumstances such as Mando's youth, low I.Q., and psychological trauma, defense counsel also accurately advised the court that she would be deported and separated from her two young children if sentenced to prison for 365 days or more. Mot. for Downward Departure 16. Taking all of those factors under consideration, the judge sentenced Mando to eleven months, time served. Mando is currently raising her children in Nashville. Baker Letter 2.

B. Ney Medina

In 1990, Ney Medina immigrated to the United States from the Dominican Republic at age five. Letter from Ann H. Mathews, counsel for Ney Medina, May 28, 2009, at 1.[20] He attended school in the United States and considers America his home. He is currently raising his three-year-old daughter, an American citizen. *Id.*

In 2008, Medina, then 23, was charged in two cases. In the first case, filed by his adult cousin, he was charged with assault, menacing, and harassment. The second case, filed by his cousin's friend, involved charges of petit larceny and criminal possession of stolen property (a cell phone). Mathews Letter 1-2. The prosecutor initially offered Medina a plea to a Class B misdemeanor in each case, with a sentence of anger management and restitution for the stolen cell phone. *Id.* Despite the relatively low sentences offered, Medina's attorneys were concerned that the convictions could be considered crimes involving moral turpitude under federal immigration law. *Id.* at 2. Medina would have been deportable if he had pleaded guilty to two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct. 8 U.S.C. § 1227(a)(2)(A)(ii).

Aware of those immigration consequences, Medina's attorneys negotiated an agreement with the prosecutor whereby Medina pleaded guilty to more serious counts not originally charged—possession of a weapon in the fourth degree by a non-U.S. citizen (a wire hanger)—and disorderly conduct, neither of which

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[20] *See supra* n.12.

is a crime involving moral turpitude. Mathews Letter 2-3; Plea Hr'g Tr. 3, *People* v. *Medina*, Indictment Nos. 02802C-2008, 05501C-2008 (N.Y. Sup. Ct. Bronx County Oct. 10, 2008). Medina was sentenced to three days of community service and anger management. Tr. 2. Medina has successfully completed his sentence. Mathews Letter 3.

C. Mary and Tom Nguyen

Mary Nguyen and her son Tom[21] came to the United States as refugees from Vietnam over ten years ago and established a life in Mississippi. Letter from Tuyet G. Duong, Immigration and Immigrant Rights Program, May 27, 2009, at 1.[22] In 2005, Hurricane Katrina completely ravaged their home, leaving them homeless. The Nguyens joined a group of families living in the parking lot of a casino. An individual who identified himself as a casino employee and supervisor opened the casino gift shop for the families temporarily sheltered at the casino. During the week they stayed at the casino, the families took necessary supplies from the gift shop such as toothbrushes, food, and water. *Id.* at 1-2. Shortly thereafter, the Nguyens were charged with looting under a Mississippi state law that expressly punishes individuals involved in theft following a natural disaster. *See* Miss. Code Ann. § 97-17-65(1). The crime is punishable by up to six years of imprisonment.

The Nguyens were assigned a public defender. Duong Letter 2. They also contacted a Vietnamese-

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[21] Mary and Tom Nguyen are pseudonyms.

[22] *See supra* n.12.

speaking attorney at a local Asian American legal clinic to help them navigate the criminal justice system. The attorneys explained the charges and the possible immigration consequences of their plea. The Nguyens adamantly maintained that, because they were invited to take what they needed, they were not guilty. Although the Nguyens wanted to go to trial, both of their attorneys advised them that if they were found guilty at trial and sentenced to more than one year in prison, they would be automatically deported as aggravated felons.[23] With the advice of counsel, the Nguyens accepted a plea agreement that included a fine and a term of probation rather than imprisonment. *Id.* As a result of that informed choice, the Nguyens avoided deportation to Vietnam, a country they had fled and where they feared they would be persecuted upon their return. *Id.*

CONCLUSION

This Court should conclude that, under the Sixth Amendment standards for ineffective assistance of counsel, defense counsel is required accurately to advise a non-citizen client of the immigration consequences of accepting a guilty plea.

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[23] Theft for which the term of imprisonment is at least one year is an aggravated felony under the INA. 8 U.S.C. § 1101(a)(43)(G).

Respectfully submitted.

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APPENDIX

LIST OF ADDITIONAL AMICI CURIAE

Asian American Institute (AAI) is a pan-Asian, non-partisan, not-for-profit organization located in Chicago, Illinois, whose mission is to empower the Asian American community through advocacy by using coalition building, education, and research. AAI's programs include community organizing, leadership development, and legal advocacy. Asian Americans are a diverse and often overlooked community, but they are one of the fastest-growing populations in the United States. AAI strives to put a human face on the challenges that immigrants experience and illustrate the real-life experiences of non-citizens. Accordingly, AAI has an important interest in *Padilla* v. *Kentucky*, which implicates the ability of non-citizens to make fully informed decisions about their criminal cases and avoid unduly harsh consequences to themselves and their families.

The Asian Law Alliance (ALA), founded in 1977, is a non-profit public interest legal organization with the mission of providing equal access to the justice system to the Asian and Pacific Islander communities in Santa Clara County, California. In the area of immigration law, ALA has represented countless immigrants in the criminal justice system, as well as immigrants concerned about the immigration consequences of their criminal convictions.

The Asian Law Caucus (ALC), founded in 1972, is a non-profit organization advancing the legal and civil rights of Asian American and Pacific Islander communities. It is the nation's oldest legal organization serving Asian Americans and is dedicated to the pursuit of equality and justice for all sectors of society, with a specific focus directed toward addressing the needs of low-income, immigrant, and underserved Asians and

Pacific Islanders. Through legal services and community education, ALC advocates for the rights of immigrants whose language abilities or lack of resources make them particularly vulnerable in our justice system.

The Asian Pacific American Legal Center of Southern California (APALC) was founded in 1983 and is the largest non-profit public interest law firm devoted to the Asian Pacific American community, serving 15,000 individuals and organizations a year. APALC provides direct legal services and uses impact litigation, public advocacy, and community education to obtain, safeguard, and improve the civil rights of the Asian Pacific American community. APALC represents Asian Pacific Americans in a number of areas, including immigration and citizenship, anti-discrimination, workers' rights, voting rights, domestic violence, and hate crimes. Through case work and policy advocacy, APALC has sought to ensure equal access to justice for immigrants, particularly those subject to the consequences of the country's immigration laws.

Boat People, SOS (BPSOS) is a national immigrant services organization serving primarily Vietnamese refugees and immigrants with 13 branch offices nationwide. BPSOS's domestic operation includes an array of human and immigration services for Vietnamese refugees, asylees, and immigrants to assist in their integration into American life. BPSOS provides limited immigration assistance including visa applications, adjustment of status, naturalization, and citizenship services.

The Center for Pan Asian Community Services (CPACS) is a private non-profit organization in At-

lanta, Georgia, whose mission is to create and deliver culturally competent and comprehensive social and health services to counteract problems faced by immigrants, refugees, and racial-ethnic minorities. Established as the first and largest Asian and Pacific Islander health and human service agency in the Southeast region, CPACS has been providing its core group of services to immigrant and refugee families in Georgia for over 25 years. CPACS's legal department represents clients from all over the United States and from countries all over the world on a range of immigration issues. Through its programs, many of which are based on the principle of targeting women, children, and families, CPACS strives to ensure that immigrants have the knowledge and resources to navigate American society and its legal system.

Florida Immigrant Advocacy Center (FIAC), a not-for-profit law firm, was founded in 1996 when federal funding restrictions limited Legal Services' ability to handle immigration cases on behalf of indigent clients. FIAC's mission is to protect and promote the basic human rights of immigrants of all nationalities. FIAC serves the most vulnerable immigrant populations through direct services, federal court litigation, impact advocacy, and education. For more than twelve years, FIAC attorneys have represented individual clients in removal proceedings before immigration judges, the Board of Immigration Appeals, and the U.S. Court of Appeals for the Eleventh Circuit. Through this work, FIAC routinely encounters longtime lawful permanent residents facing deportation as a result of guilty pleas to charges they did not know carried drastic immigration consequences.

The Fred T. Korematsu Center for Law and Equality (Korematsu Center) is a non-profit organization

based at Seattle University School of Law and works to advance justice through research, advocacy, and education. The Korematsu Center is dedicated to advancing the legacy of Fred Korematsu, who defied the military orders during World War II that ultimately led to the internment of 110,000 Japanese Americans. He took his challenge of the military orders to the United States Supreme Court, which upheld his conviction in 1944 on the ground that the removal of Japanese Americans was justified by "military necessity." Fred Korematsu went on to successfully challenge his conviction and to champion the cause of civil liberties and civil rights for all people. The Korematsu Center, inspired by his example, works to advance his legacy by promoting social justice for all. It has a special interest in promoting fairness in the courts of our country. That interest includes ensuring effective assistance of counsel, especially when legal advice is given that has consequences relating to the detention or removal of individuals, many of whom have extensive ties to the United States. The Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

The National Asian Pacific American Bar Association (NAPABA) is the national association of Asian Pacific American attorneys, judges, law professors, and law students. NAPABA represents the interests of over 40,000 attorneys and 58 local Asian Pacific American bar associations. Its members include solo practitioners, large firm lawyers, corporate counsel, legal service and non-profit attorneys, and lawyers serving at all levels of government. Since NAPABA's inception in 1988, it has promoted justice, equity, and opportunity for Asian Pacific Americans, as the national voice for Asian Pacific Americans in the legal profession. These

efforts have included civil rights advocacy on various fronts. In furtherance of its mission to promote justice, equity, and opportunity for Asian Pacific Americans, NAPABA joins amici to protect the rights of non-citizens who are particularly vulnerable due to their limited language capabilities and lack of resources.

The National Asian Pacific American Women's Forum (NAPAWF) is the only national, multi-issue Asian and Pacific Islander women's organization in the country. NAPAWF's mission is to build a movement to advance social justice and human rights for Asian and Pacific Islander women and girls. We advocate for the rights of immigrant women, girls, and their families given their particular vulnerabilities within the immigration and justice systems due to their lower economic status, limited access to education and resources, and limited English speaking abilities.

Heartland Alliance's National Immigrant Justice Center (NIJC) is a not-for-profit organization, accredited by the Board of Immigration Appeals to provide immigration assistance since the late 1970s. NIJC promotes human rights and access to justice for immigrants, refugees, and asylum seekers through legal services, policy reform, impact litigation, and public education. With the support of the Chicago Bar Foundation and others, NIJC created the Defenders Initiative, which currently provides legal consultations, trainings, and materials to criminal defense attorneys to understand the consequences of criminal convictions on immigration status. In fiscal year 2008, NIJC provided critical legal representation and education to more than 8,000 asylum seekers, refugees, survivors of domestic violence, detained immigrants, victims of human trafficking, and other immigrants facing removal and family separation.

The National Korean American Service and Education Consortium (NAKASEC) was founded as a consortium in 1994 by local community centers who realized that only by coming together can we build and contribute to a national movement for civil rights. Our mission is to project a national progressive voice on major civil rights and immigrant rights issues and promote the full participation of Korean Americans in American society.

The North Carolina Justice Center, through its Immigrants' Legal Assistance Project, has been the primary provider of legal representation to low-income immigrants in North Carolina for over 13 years. The North Carolina Justice Center represents individuals and families in establishing their status as citizens or legal residents of this country. It provides this representation before Citizenship and Immigration Services, Immigration Court, and the Board of Immigration Appeals. Justice Center staff also work with and provide training to public defenders, private criminal defense attorneys, and district attorneys about the specific immigration consequences of plea bargains and/or convictions of immigrants facing criminal charges.

Organization of Chinese Americans (OCA) is a national organization dedicated to advancing the social, political and economic well-being of Asian Pacific Americans. Headquartered in Washington, D.C., OCA represents members and associates in over 80 chapters and college affiliates across the country. For 36 years, OCA has worked to defend the rights of the Asian Pacific American and immigrant communities and ensure that they are accorded the rights guaranteed to them under the Constitution and federal, state, and local law.

South Asian Americans Leading Together (SAALT) is a national non-profit organization whose

mission is to promote the full and equal civic and political participation of South Asians in the United States. As a predominantly foreign-born community, many South Asians confront a range of challenges during removal proceedings, particularly in light of post-9/11 criminal and immigration enforcement measures. SAALT joins this amicus brief to help ensure that individuals in immigration proceedings have meaningful access to effective assistance of counsel, particularly as it relates to immigration consequences resulting from guilty pleas.

The Southeast Asia Resource Action Center (SEARAC) is a national non-profit organization advancing the interests of Southeast Asian Americans through leadership development, capacity building, and community empowerment. SEARAC has been a strong advocate of immigrant rights, particularly around the issue of deportation and its impact on Southeast Asian American families. For those who come in contact with the legal system, immigration consequences resulting from criminal convictions, even minor ones, have been especially harmful because of inadequate information and representation provided by their counsel. SEARAC has particular concern regarding the deportation of individuals who arrived as refugees back to the very same countries they fled in fear of persecution. SEARAC supports this brief to highlight the life-long immigration impact that ineffective assistance of defense counsel has on thousands of legal permanent residents, including those who arrived as refugees, and their families across this country.

The Southern Coalition for Social Justice (SCSJ) promotes justice by empowering minority and low-income communities to defend and advance their political, social, and economic rights. SCSJ uses the com-

bined skills of lawyers, social scientists, community organizers, and media experts to help underrepresented people develop strategies to achieve their visions for themselves and their communities, incorporating an international human rights perspective, and linking their efforts to broader processes of political, legal, social, and economic change in the South. As part of this effort, SCSJ has been active in working for the rights of immigrant communities, including advocacy, education, and direct representation in the immigration courts.

AMICUS CURIAE BRIEF

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No. 08-651

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Supreme Court of the United States

JOSE PADILLA,
Petitioner,

v.

COMMONWEALTH OF KENTUCKY,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees.

CAC works to defend constitutional protections for non-citizen immigrants as well as citizens through its Human and Civil Rights Program and its focus on citizenship, immigration and the Constitution. The framers of the Fourteenth Amendment established a system of overlapping protections by guaranteeing the privileges and immunities of citizens while protecting the rights of *all* persons to due process and equal protection of the laws. CAC is committed to fulfilling these textual guarantees in the courts and Congress.

This case raises the question of what the right to assistance of counsel articulated in the Sixth Amendment and applied to the States through the

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[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Fourteenth Amendment's Due Process Clause means in the context of misadvice as to the serious immigration consequences of a guilty plea. CAC has an interest in demonstrating that the text and history of the Fourteenth Amendment's Due Process Clause show that the framers of the Amendment were particularly concerned that non-citizens be treated fairly in state criminal justice systems.

SUMMARY OF ARGUMENT

The Fourteenth Amendment requires states to provide the protections of equality and fundamental fairness to aliens as well as to citizens. In the vision of our Reconstruction Framers, "no man, no matter what his color, no matter beneath what sky he may have been born, . . . shall be deprived of life, liberty, or property without due process of law." Cong. Globe, 39th Cong., 1st Sess. 1094 (1866). This framing vision, and its manifestation in the Due Process Clause, mandate that the Sixth Amendment right to counsel in criminal proceedings, incorporated through the Fourteenth Amendment, is not diminished when a non-citizen defendant stands accused in our criminal justice system. The Supreme Court of Kentucky's ruling—that counsel's advice at the plea stage regarding likely deportation is outside the scope of the Sixth Amendment—cannot be squared with this constitutional first principle.

In order for a non-citizen defendant to enjoy the full scope of due process protections guaranteed

to him by the Fourteenth Amendment, the Sixth Amendment right to effective assistance of counsel must mean—at least—that counsel has a duty not to give objectively, egregiously incorrect advice as to the immigration consequences of a guilty plea. Regardless of whether automatic deportation flowing from an aggravated felony conviction is labeled as a direct or collateral consequence—and Petitioner has made a compelling argument that the false dichotomy between direct and collateral consequences has no place in the ineffective-assistance-of-counsel inquiry—due process is not satisfied when a lawful permanent resident alien is induced to plead guilty based on blatantly incorrect legal advice regarding post-conviction deportation.

This Court has recognized that deportation is akin to banishment, a harsh penalty that is frequently perceived to be a more serious consequence of conviction than the criminal sentence itself and, accordingly, of great import to an immigrant defendant deciding whether to plead guilty. If citizens were automatically banished as a result of certain criminal convictions, surely the Constitution would require that they not be misinformed as to this drastic consequence when deciding whether or not to plead guilty to a charged offense. There is no constitutional reason why a non-citizen criminal defendant, faced with the equivalent of banishment as an inevitable result of a conviction, should not be properly advised of the immigration consequences of his plea and receive the full scope of due process protections.

The rights to effective assistance of counsel and due process of law are violated when state criminal justice systems maintain guilty pleas that were secured through blatant misadvice of counsel regarding a consequence as serious as deportation. In light of the full constitutional protections extended to non-citizens by the Fourteenth Amendment, and the seriousness of the consequence of deportation, the scope of the Sixth Amendment right to effective assistance of counsel cannot be as limited as the Kentucky Supreme Court's cramped conception of that right.

ARGUMENT

I. THE TEXT AND HISTORY OF THE FOURTEENTH AMENDMENT REQUIRE STATES TO PROVIDE THE FULL RANGE OF DUE PROCESS PROCEDURAL PROTECTIONS TO ALL PERSONS.

Drafted in 1866 and ratified in 1868, the Fourteenth Amendment wrote into our Constitution broad protections for liberty and equality, and guarantees of impartial justice for all people residing in the United States, citizens and non-citizens alike. Its words provide:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

> United States; nor shall any State deprive *any person* of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST., amend. XIV, § 1 (emphasis added).

As the plain language of the text reflects, the final two clauses of Section 1 provide protections not just to "citizens," but rather to "any person," a broader scope of coverage designed to specifically include both citizens and aliens residing on American soil. Senator Jacob Howard, speaking on behalf of the Joint Committee on Reconstruction that drafted the Amendment, explained this difference during the Senate debates on the Fourteenth Amendment. Sen. Howard observed that the Privileges or Immunities Clause would protect "those fundamental rights and privileges which pertain to citizens of the United States," Cong. Globe, 39th Cong., 1st Sess. 2766 (1866), while the "last two clauses . . . disable a State from depriving not merely a citizen of the United States but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State." *Id. See also* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 182 (1998) ("The privileges-or-immunities clause would protect citizen rights, and the due-process and equal-protection principles . . . would protect the wider category of persons.").

Other framers of the Fourteenth Amendment emphasized that the Due Process Clause's fair trial guarantee specifically included aliens as well as citizens. During debates on an early version of the Fourteenth Amendment, Representative John Bingham—the main author of Section 1—explained that, "no man, no matter what his color, no matter beneath what sky he may have been born, . . . no matter how poor, no matter how friendless, no matter how ignorant shall be deprived of life, liberty, or property without due process of law—law . . . which is impartial, equal, exact justice." Cong. Globe, 39th Cong., 1st Sess. 1094 (1866).

The prevailing understanding of due process at the time of Reconstruction looked to "the Constitution itself" to define the term. *Murray v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276-77 (1856). Accordingly, the "impartial, equal, and exact justice" written into the Fourteenth Amendment's Due Process Clause required states to provide to all persons on American soil the specific procedural protections in the Bill of Rights, including the Sixth Amendment's guarantee of assistance of counsel at issue here. *See* AMAR, *supra*, at 173 ("[P]rocedural due process embodied—incorporated, if you will—all the other procedural rules laid down in '"the Constitution itself."') (quoting *Murray*, 59 U.S. at 276-77); *cf. Gideon v. Wainwright*, 372 U.S. 335, 339-45 (1963) (applying to the states the fundamental Sixth Amendment right to assistance of counsel).

The Fourteenth Amendment's textual design reflected an enduring American constitutional

tradition of providing due process protections to all persons residing on American soil, regardless of whether they were citizen or alien. The Due Process Clause, initially included in the Fifth Amendment, grew out of the Magna Carta, that great 13th century charter of English liberty. *See Murray*, 59 U.S. at 276. But, unlike the Magna Carta, whose protections applied only to "freemen," the Due Process Clause applied universally, protecting all persons.

This difference was foremost in the minds of the framers of the Fourteenth Amendment. As Rep. Bingham observed a few years before he drafted the Fourteenth Amendment: "This clear recognition of the rights of all was a new gospel to mankind, something unknown to the men of the thirteenth century . . . . The barons of England demanded the security of law for themselves; the patriots of America proclaimed the security and protection of the law for *all* . . . no matter whether citizen or strangers." Cong. Globe, 37th Cong., 2nd Sess. 1638 (1862). The wording of the Due Process Clause of the Fifth Amendment—soon to be copied into the Fourteenth Amendment—was proof positive that the Due Process Clause "embrace[s] all men when the Constitution guarantees life and liberty and trial by jury. The Constitution has the same care for the rights of the stranger within your gates as for the rights of the citizen." Cong. Globe, 36th Cong., 2nd Sess. app. 83 (1861).[2]

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[2] *Amicus* recognizes that this Court has countenanced limits placed on an alien's due process rights when Congress exercises its plenary power over naturalization. *Demore v.*

II. CONTEMPORANEOUS CONGRESSIONAL ACTION AND SUBSEQUENT SUPREME COURT CASE LAW CONFIRM THAT NON-CITIZENS WERE TO ENJOY THE FULL SCOPE OF DUE PROCESS PROTECTIONS IN OUR NATION'S COURTS.

The Fourteenth Amendment specifically gave Congress power to enforce the Amendment's new constitutional guarantees, curing what Rep. Bingham called the "great want of the citizen and stranger, protection by national law from unconstitutional State enactments . . . ." Cong. Globe, 39th Cong., 1st Sess. 2543 (1866). Within two years of the Amendment's ratification, Congress used its enforcement power to protect the constitutional rights of resident aliens, primarily Chinese immigrants in California.

The Enforcement Act of 1870, 16 Stat. 140, 144 (codified at 42 U.S.C. § 1981), banned discrimination against aliens in the exercise of civil rights and ensured that aliens would have the same rights as citizens to enjoy the full and equal benefit of all laws for the security of person and

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Kim, 538 U.S. 510, 521 (2003) (explaining that, "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens") (citation omitted). This special treatment of congressional action establishing rules for removal proceedings is not at issue here.

property, including procedural fair trial guarantees applicable in state courts. As Senator William Stewart explained, "we will protect Chinese aliens or any other aliens who we allow to come here, and give them a hearing in our courts; let them sue and be sued; and let them be protected by all the laws and the same laws that other men are." Cong. Globe, 41st Cong., 2nd Sess. 3658 (1870).

Opponents of the Fourteenth Amendment and the 1870 Act never once contradicted the idea that the Fourteenth Amendment would protect resident aliens. Instead, they appealed to prejudice, arguing against giving aliens any such legal rights. The 1870 Act, for example, was bitterly attacked for giving federal protections to the "hordes [that] infest our country." *Id.* at 3880. The congressmen who had just framed the Fourteenth Amendment rejected these attacks. They argued that the Amendment's "express words" protected aliens, *id.* at 3871 (Rep. Bingham), and that it was Congress' "solemn . . . duty to see that those people are protected . . . ." *Id.* at 3658 (Sen. Stewart).

Consistent with this text and history, the Supreme Court recognized in 1886 that the Fourteenth Amendment "is not confined to the protection of citizens." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). Referring to both the Due Process and Equal Protection Clauses, the *Yick Wo* Court observed that "[t]hese provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . . ." *Id.*

It is now settled law that aliens within the United States enjoy robust due process protections, including the Sixth Amendment right to counsel. *E.g., Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (explaining that, "once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent"); *see also Plyler v. Doe*, 457 U.S. 202, 215 (1982) ("Whatever his status under immigration law, an alien is surely a 'person' in any ordinary sense of that term."); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (holding that "all persons within the territory of the United States," including aliens, "are entitled to the protection" guaranteed by the Fifth and Sixth Amendments). The question raised by this case is what these Sixth Amendment and due process rights mean in the context of advice about the immigration consequences of a criminal conviction.

As demonstrated above in Section One, our constitutional text and history establish that non-citizens were intended to receive the full scope of due process protections under the Fourteenth Amendment. Contemporaneous congressional action and subsequent Supreme Court precedent confirm that the Constitution plainly guarantees that all persons, whether citizen or alien, be treated fairly in our criminal justice system. As well-settled as these fundamental principles are in our constitutional jurisprudence, they are completely ignored by the Kentucky Supreme

Court's conception of the scope of the right to effective assistance of counsel. When the Sixth Amendment right is viewed within its proper constitutional context, the lower court's application of the collateral-consequences rule to bless counsel's ineffective assistance at the plea stage is clearly wrong.

III. IMMIGRANT DEFENDANTS CANNOT ENJOY THE FULL SCOPE OF DUE PROCESS PROTECTIONS IF COUNSEL CAN INDUCE A GUILTY PLEA THROUGH ERRONEOUS ADVICE AS TO THE IMMIGRATION CONSEQUENCES OF CONVICTION.

The Constitution's promise of due process for all will ring hollow if non-citizen defendants can be induced to plead guilty based on completely erroneous advice as to the immigration consequences of their conviction. The constitutional first principles outlined above make clear that due process for non-citizen defendants requires that they not be misled as to the immigration consequences of their guilty pleas.

Deportation is a severe punishment akin to banishment, and, as an often inevitable consequence of a guilty plea, surely requires adequate advice and effective counsel under the Sixth Amendment. *Cf. Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165-66 (1963) (finding citizenship-stripping statutes unconstitutional "because in them Congress has plainly employed the sanction of deprivation of nationality as a

punishment—for the offense of leaving or remaining outside the country to evade military service—without affording the procedural safeguards guaranteed by the Fifth and Sixth Amendments").[3] As Petitioner has argued, in light of the severity of deportation, even if the Court does not reject the collateral-consequences rule altogether it should nonetheless refuse to apply the rule to ineffective-assistance claims based on advice about deportation consequences. Br. of Petitioner at 50-55. The historical treatment of banishment and deportation supports this argument.

Throughout history, banishment has been recognized as a harsh and drastic consequence. *See generally Stogner v. California*, 539 U.S. 607, 643 (2003) (Kennedy, J., dissenting) (explaining that historically banishment was considered to be punishment for severe offenses and was "'the highest punishment next to death'") (quoting *Edward Earl of Clarendon's Trial*, 6 How. St. Tr. 292, 386 (1667)). Banishment has been acknowledged as a particularly harsh punishment for centuries, and was recognized as such both at the time of our Nation's Founding and its Reconstruction. *See Stogner*, 539 U.S. at 642, 644-45 (Kennedy, J., dissenting); *see also id.* at 644-45 (citing William F. Craies, *Compulsion of Subjects to Leave the Realm*, 6 L.Q. Rev. 388, 392 (1890) ("[B]anishment, perpetual or temporary, was well known to the common law"); An Act for

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[3] The Court subsequently determined that citizens could not be involuntarily deprived of their citizenship. *Afroyim v. Rusk*, 387 U.S. 253 (1967).

Punishment of Rogues, 39 Eliz. 1, c. 4, s. 4 (1597); Roman Catholic Relief Act, 10 Geo. 4, c. 7, s. 28 (1829) (providing for the banishment of Jesuits)). In 1798, this Court in *Calder v. Bull* cited the banishments of Lord Clarendon in 1667 and Bishop Francis Atterbury in 1723 as examples of improper, increased punishments exacted by British parliamentary enactments. 3 Dall. 386, 389 (1798). *See also Mendoza-Martinez*, 372 U.S. at 168 n.23 ("[F]orfeiture of citizenship and the related devices of banishment and exile have throughout history been used as a punishment... . Banishment was a weapon in the English arsenal for centuries, but it was always adjudged a harsh punishment even by men accustomed to brutality in the administration of criminal justice.") (citations and quotation marks omitted).

Recognizing that removal of a resident alien can be as severe a punishment as criminal banishment, James Madison argued in opposition to the Alien and Sedition Act that:

> [i]f the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness, a country where he may have formed the most tender connections; where he may have invested his entire property, and acquired property of the real and permanent, as well as the moveable and temporary, kind; where he enjoys, under the laws, a greater share of the blessings of personal security and

> personal liberty than he can elsewhere hope for; * * * if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the names can be applied.

James Madison, Report on the Virginia Resolutions of 1799, in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 555 (1836), *quoted in Fong Yue Ting v. United States*, 149 U.S. 698, 740-41 (1893) (Brewer, J., dissenting).[4] This Court has echoed Madison's sentiments, explaining that:

> Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.

Bridges v. Wixon, 326 U.S. 135, 154 (1945).

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[4] The Alien and Sedition Act passed over Madison's objections and expired in 1800. Madison's views were more enduring, however, and, "by 1832, Vice-President John C. Calhoun asserted that the unconstitutionality of the Alien and Sedition laws was 'settled.'" Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1, 98 (2002).

There is a compelling argument that the line between penal and immigration consequences has been blurred, *see* Br. of National Ass'n of Criminal Defense Lawyers, et al., but the Court need not decide whether removal is the equivalent of criminal punishment in order to resolve this case. As Justice Murphy explained, concurring in *Bridges*, "It is no answer that a deportation proceeding is technically non-criminal in nature and that a deportable alien is not adjudged guilty of a 'crime.' Those are over-subtle niceties that shed their significance when we are concerned with safeguarding the ideals of the Bill of Rights." 326 U.S. at 163-164 (Murphy, J., concurring). The severity of deportation and its importance to an alien's decision whether to plead guilty to a crime cannot be understated, as this Court has recognized. *INS v. St. Cyr*, 533 U.S. 289, 322 (2001). Indeed, "[t]he impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence." *Bridges*, 326 U.S. at 164 (Murphy, J., concurring).

Deportation is a particularly serious penalty for longtime lawful permanent residents like Mr. Padilla.[5] *See Landon v. Plasencia*, 459 U.S. 21, 32

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[5] The status of lawful permanent resident aliens closely approximates that of a citizen, making distinctions between citizens and lawful permanent resident aliens in the context of automatic removal as a result of an uninformed guilty plea even more troubling. As Justice Souter has explained, "[t]he immigration laws give LPRs the opportunity to establish a life permanently in this country by developing economic, familial, and social ties indistinguishable from those of a citizen."

(1982) (noting that, "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly"). Mr. Padilla has made this country his home for over forty years, and served honorably in the defense of the United States in Vietnam. He has built a life here. The Court has characterized the interests of lawful permanent resident aliens like Mr. Padilla as undeniably "weighty," *id.* at 34, given that a permanent resident alien stands to "lose the right 'to stay and live and work in this land of freedom,'" *id.* (quoting *Bridges*, 326 U.S. at 154), as well as "the right to rejoin [his] immediate family, a right that ranks high among the interests of the individual," *id.* (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503-04 (1977); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)). In light of these "weighty" interests, this Court has expressly recognized that deportation "can be the equivalent of banishment or exile." *Rosenberg v. Fleuti*, 374 U.S. 449, 456-458 (1963) (quoting *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947)).

The severity of removal from one's home country and the importance of being properly informed as to whether it is a likely consequence of a guilty plea is clear under this Court's due process jurisprudence. Before the Court rejected involuntary expatriation of citizens altogether, it held that federal statutes automatically stripping

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Demore v. Kim, 538 U.S. 510, 544 (2003) (Souter, J., concurring in part and dissenting in part).

citizens of their citizenship status were unconstitutional if they did not afford due process rights, including the Sixth Amendment right to counsel. *Mendoza-Martinez*, 372 U.S. at 164-67. The Fourteenth Amendment's Due Process Clause will tolerate no less for non-citizens.

In deciding whether to plead guilty, Mr. Padilla should have been able to make an informed choice as to whether the potential for a slightly reduced term of imprisonment was worth near-certain deportation—or at least not have been expressly and incorrectly advised that his conviction would not cause him to be deported. He has stated, unchallenged, that he accepted the plea bargain in reliance on his attorney's advice that he did not have to worry about his immigration status and that he would have made a different choice had he been aware of the actual immigration consequences of his plea. Br. of Petitioner at 10-11; J.A. 72-73. Thus, the question is whether a person facing exile from his lawful home of almost half a century as an automatic result of a state criminal conviction is deprived of effective assistance of counsel if he decides to plead guilty to such crime after being incorrectly advised that he would not face removal. The text and history of our Constitution provide a clear answer: non-citizen defendants must be properly advised of the automatic immigration consequences of conviction—or at the very least not misadvised of these serious consequences.

* * *

The Due Process Clause applies to *all* persons and the Sixth Amendment right to effective counsel applies to any "accused" defendant in any and all "criminal prosecutions." Because an inevitable consequence of conviction as severe as deportation is undoubtedly crucial to an intelligent guilty plea, we urge the Court to find that counsel's error is not categorically excluded from an ineffective-assistance-of-counsel inquiry by operation of the Kentucky Supreme Court's formulation of the collateral-consequences rule.

Mr. Padilla is entitled to the full and fair justice promised to all persons in the Fourteenth Amendment, and he should be allowed the opportunity to prove that his counsel's woefully incorrect immigration advice fell below the Sixth Amendment standard for effective representation.

CONCLUSION

The judgment of the Kentucky Supreme Court should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE
Supreme Court of the United States

JOSE PADILLA,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Kentucky

BRIEF FOR LEGAL ETHICS, CRIMINAL PROCEDURE, AND CRIMINAL LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does the Sixth Amendment's guarantee of effective assistance of counsel require a criminal defense attorney to advise a client who is not a citizen that pleading guilty to an aggravated felony will trigger mandatory, automatic deportation?

2. If the criminal defense attorney misadvises his noncitizen client that a guilty plea will not lead to deportation, and that misadvice induces a guilty plea, does that misadvice amount to ineffective assistance of counsel and warrant setting aside the guilty plea?

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae legal ethics, criminal procedure, and criminal law professors are 37 law professors who teach, research, and write about criminal law, criminal procedure, or legal ethics, including their intersection. The names, titles, and institutional affiliations (for identification purposes only) of these *amici* are listed in Appendix A. Some *amici* work as clinical professors, in which capacity they regularly counsel and advise clients in criminal matters and train attorneys on how to effectively represent such clients. *Amici* have a professional interest in this Court's consideration of the doctrinal, historical, and policy issues involved in this Court's interpretation of the Sixth Amendment's guarantee of effective assistance of counsel, and the related issues surrounding standards of attorney competence.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Strickland v. Washington*, this Court established a two-part test for evaluating ineffective assistance of counsel claims under the Sixth Amendment: "First, the defendant must show that counsel's performance was deficient"—i.e., that it "fell below an objective standard of reasonableness." 466 U.S. 668, 687–88 (1984). "Second, the defendant must show

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1 This brief was not authored, in whole or in part, by counsel for either party, and no person or entity other than *amici* and their counsel contributed monetarily to its preparation or submission. The parties have consented to the filing of this brief and copies of their letters of consent have been lodged with the Clerk of the Court.

that the deficient performance prejudiced the defense." *Id.* In *Hill v. Lockhart*, this Court held that the test set out in *Strickland* applies in the guilty plea setting. 474 U.S. 52, 56–57 (1985). However, the scope and manner in which *Strickland* applies to attorney advice on the "collateral consequences" of a plea—those consequences not directly imposed by the trial judge[2]—is still a matter of much debate.

A small number of courts—including the Kentucky Supreme Court in the decision under review—have held that attorney advice relating to collateral consequences is completely outside the scope of the Sixth Amendment, *see Commonwealth v. Padilla*, 253 S.W.3d 482, 485 (Ky. 2008), because such advice does not relate directly to a "determination of guilt or innocence." *Commonwealth v. Fuartado*, 170 S.W.3d 384, 386 (Ky. 2005). A larger group of courts have held that *Strickland* applies to collateral consequences advice, because "[t]his Court's precedent 'dictate[s]'" that the courts below apply *Strickland* when entertaining ineffective-assistance claims, *Williams v. Taylor*, 529 U.S. 362, 391 (2000), but that attorney advice relating to collateral consequences is "*never* deficient performance under *Strickland*." *Santos-Sanchez v. United States*, 548 F.3d 327, 334 (5th Cir. 2008) (emphasis added). This position is based on the legal fiction that consequences not imposed directly by the court, no matter their actual severity, can *never* be material to defendants

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[2] The definition of, and dividing line between, "collateral" and "direct" consequences is itself a matter of much confusion in the lower courts. *See infra* pp. 30–32. This is one of the common formulations. *See infra* note 19.

in deciding whether to plead guilty. Finally, a third group of courts have held that attorney advice regarding collateral consequences must be analyzed under *Strickland*, *see Williams*, 529 U.S. at 391; *Wiggins v. Smith*, 539 U.S. 510, 521 (2003), and that because *Strickland* requires a case-by-case evaluation of attorney performance, such advice can, at least in some circumstances, violate *Strickland*'s performance prong. *See, e.g.*, *State v. Paradez*, 101 P.3d 799, 804–05 (N.M. 2004).

The first two approaches are inconsistent with this Court's Sixth Amendment decisions. The approach adopted by the Supreme Court of Kentucky conflicts with this Court's decision in *Lockhart*, which rejected the contention that advice relating to collateral consequences is outside the scope of the Sixth Amendment, and held that "the two-part *Strickland v. Washington* test applies." 474 U.S. at 58. The approach of the majority of courts—that advice relating to collateral consequences can never violate *Strickland*'s performance prong—conflicts with this Court's teaching that the attorney performance analysis must be case-specific and context-based, and that categorical rules for attorney performance are therefore "not appropriate," *Strickland*, 466 U.S. at 688–89. This approach is also inconsistent with our legal system's circumstance-dependent conception of attorney competence.

Both categorical approaches are also inconsistent with counsel's Sixth Amendment responsibilities in ensuring a voluntary and intelligent guilty plea. Where an issue is of critical importance to the client in deciding whether to plead guilty or go to trial, this Court's decisions make clear that the competent attorney will discuss that issue with the client in ad-

vance of the plea, and that the plea is only intelligent with the benefit of such advice. The collateral consequences doctrine categorically—and wrongly—obviates that responsibility of counsel, simply because courts do not have such a responsibility under the Due Process Clause.

Application of *Strickland*'s settled test to attorney advice on collateral consequences will not prove unduly burdensome to courts or counsel. In many cases, *Strickland*'s demanding prejudice prong will serve as an effective and efficient bar to relief without necessitating any inquiry into attorney performance, as defendants generally will have difficulty demonstrating that they would have insisted on going to trial but for the attorney's allegedly deficient advice on a collateral consequence. For claims that survive the prejudice prong, courts will apply *Strickland*'s settled, common sense, and easily-understood test of objective reasonableness under the circumstances, a standard that will eliminate much of the confusion and difficulty that has developed around the supposedly bright line of the collateral consequences doctrine. *Strickland*'s context-dependent standard also will serve an important limiting function with respect to counsel's duties in the collateral consequences context, as an attorney is only required to advise to the extent that is reasonable under the circumstances, rather than on every conceivable collateral consequence and in every case.

ARGUMENT

I. Exclusion Of All Attorney Advice Relating To Collateral Consequences From Sixth Amendment Scrutiny Is Inconsistent With This Court's Sixth Amendment Decisions

Contrary to the holding of the Kentucky Supreme Court, this Court has specifically declined to carve out collateral consequences-related advice from the scope of the Sixth Amendment, *see Lockhart*, 474 U.S. at 56, which applies to all critical stages of the criminal proceeding. Moreover, while a majority of lower courts have held that collateral consequences-related advice can *never* be constitutionally deficient, *Strickland* and its progeny make clear that courts must engage in a context-dependent evaluation of attorney performance in light of all the circumstances. Finally, this Court has made clear that the Sixth Amendment requires that an attorney provide advice adequate to facilitate an intelligent plea, which often requires advice on consequences of import to the particular defendant that—for the purposes of the court's duties—may be deemed collateral.

A. Claims Related To Collateral Consequences Of Guilty Pleas Are Not Outside The Sixth Amendment's Effective Assistance Guarantee

A small number of lower courts, including Kentucky's Supreme Court in the decision under review, have held that advice on collateral consequences is completely "outside the scope" of the Sixth Amendment. *Padilla*, 253 S.W.3d at 485; *see also United States v. Matar*, 209 F. App'x 553, 556 (7th Cir. 2006) (unpublished opinion) ("[C]ollateral aspects of the

prosecution [are] not covered by the Sixth Amendment."); *Rumpel v. State*, 847 So. 2d 399 (Ala. Crim. App. 2002). In reaching this conclusion, the Kentucky Supreme Court adopted the reasoning of its recent decision in *Fuartado*, which held that because "'[t]he Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial[,]'" 170 S.W.3d at 386 (quoting *Strickland*, 466 U.S. at 684), that right "encompasses only those activities which tend to protect a criminal defendant's right to a fair and intelligent determination of guilt or innocence." *Id.* Because the collateral consequences of a guilty plea are "irrelevant to the determination of a defendant's guilt or innocence[,]" *id.*, the court concluded, they do not implicate the Sixth Amendment at all.

This argument has an element of déjà vu: Before this Court's decision in *Hill v. Lockhart*, a large majority of lower courts had held that "a defendant need not be informed regarding parole eligibility because that matter is not a direct consequence of his guilty plea." Br. of Resp't at *25–26, *Hill v. Lockhart*, No. 84-1103, 474 U.S. 52 (1985), 1984 U.S. Briefs 1103 (citing cases). In *Lockhart*, Kansas argued that this result was correct because advice (and, in *Lockhart* itself, misadvice) relating to parole eligibility "was not part of the plea bargain" and could not, therefore, form the basis of a Sixth Amendment claim. *Id.* at *49. But this Court rejected the proffered collateral-consequences carve-out, instead making clear that even where advice or misadvice relates to the collateral consequences of a guilty plea, "the two-part *Strickland v. Washington* test applies." *Lockhart*, 474 U.S. at 58. The small number of courts that have held otherwise—including Kentucky's Supreme Court—are therefore in error.

In reaching its decision, the Kentucky Supreme Court misconstrued the nature and scope of the Sixth Amendment guarantee. The "plain wording" of the Sixth Amendment encompasses counsel's assistance not only at trial, but "whenever necessary to assure a meaningful 'defense'." *United States v. Wade*, 388 U.S. 218, 225 (1967) (quoting U.S. Const. amend. VI). In ineffective-assistance cases, this Court therefore looks to the nature of the interaction between the defendant and the State—specifically, whether it is a "'critical' stage[]" of the proceedings at which fundamental rights "might be sacrificed or lost" to the State, in the absence of competent counsel—to determine whether the Sixth Amendment attaches. *Id.* at 224; *accord Kansas v. Ventris*, No. 07–1356, 556 U.S. ___, ___ (2009) (slip op. at 4–5) ("The assistance of counsel has been denied . . . at the . . . critical stage which produced the inculpatory evidence [that led to a conviction.]").

There is no doubt that the plea is one such "critical stage," as a plea of guilty is itself a conviction through which the defendant relinquishes a number of constitutional rights, in an adversarial interaction with the State. *See Boykin v. Alabama*, 395 U.S. 238, 242–43 (1969) (identifying defendant's rights to trial by jury, to confront the witnesses against him, and to refrain from testifying against himself). Since the defendant has a right to counsel at this stage, he has a right to effective assistance of counsel *at this stage*; this Court has never carved out specific advice from Sixth Amendment scrutiny once the right attaches. Instead, once the right attaches, whether the attorney's performance violates the Sixth Amendment is a question to be decided under *Strickland*'s two-part test. *See Wiggins*, 539 U.S. at 521; *Williams*, 529 U.S. at 391; *Lockhart*, 474 U.S. at 56.

The Kentucky Supreme Court turned this inquiry on its head by asking whether the attorney advice at issue reaches directly to a determination of guilt or innocence when the plea for which that advice is given undoubtedly does.

B. Categorical Rules Of Attorney Performance Are Inconsistent With *Strickland* And Its Progeny, And With The Role Of Counsel In Our Legal System

1. Despite the clear command from this Court that an attorney's performance must be evaluated for reasonableness on a "case-by-case," *Williams*, 529 U.S. at 391, "circumstance-specific," *Roe v. Flores-Ortega*, 528 U.S. 470, 478 (2000), "context-dependent," *Wiggins v. Smith*, 539 U.S. 510, 521 (2003), basis, and "in light of all the circumstances," *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986), many lower courts have created a bright-line rule that failure to advise on collateral consequences is "*never* deficient performance under *Strickland*." *Santos-Sanchez*, 548 F.3d at 334, 336 (emphasis added); *see also id.* at 336 ("We, like our sister circuits, have drawn a bright line between . . . direct and collateral consequences."); Br. of *Amicus Curiae* Criminal and Immigration Law Professors et al. in Support of Pet'r at 10–11, *Padilla v. Kentucky*, No. 08-651 (January 2009) [hereinafter *Certiorari Amicus* Brief of Law Professors] (citing cases).[3] This

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[3] Many of these same courts acknowledge that affirmative misadvice regarding collateral consequences can violate *Strickland*'s performance prong. *See* Br. of Pet'r at 55 n.16, *Padilla v. Kentucky*, No. 08-651 (May 26, 2009) (citing cases). While it is

[Footnote continued on next page]

approach violates the plain instructions of *Strickland* and its progeny.[4]

Roe v. Flores-Ortega is instructive on the inappropriateness of categorical rules governing attorney performance under the Sixth Amendment. The Courts of Appeals for the First and Ninth Circuits had applied a "bright-line rule," 528 U.S. at 478, and held that counsel's performance is *per se* deficient if counsel does not file a notice of appeal absent contrary instructions from the defendant. This Court emphatically rejected that approach, holding that "this *per se* rule [i]s inconsistent with *Strickland*[,]"

[Footnote continued from previous page]
undoubtedly true that misadvice on collateral consequences can amount to ineffective conduct, there is no principled reason rooted in the collateral nature of the consequence at issue that a bright-line rule on collateral consequences should be acceptable in cases of nonadvice where it is not acceptable in cases of misadvice. In both types of cases, the consequence is still collateral.

[4] Academic commentators have recognized this tension in great numbers. *See* Sarah Keefe Molina, Comment, *Rejecting the Collateral Consequences Doctrine*, 51 St. Louis U. L.J. 267, 283–84 (2006) ("Many critics correctly identify the collateral consequences doctrine as inconsistent with *Strickland*. . . . *Strickland* requires a 'circumstance-specific' inquiry[, rather than] [*p*]*er se* bright-line rules.") (footnotes omitted) (citing academic commentators); *see also, e.g.*, Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697, 712 (2002) ("[T]he first prong of *Strickland-Hill* analysis requires evaluating attorney competence. The collateral consequences rule does not capture, even as a rule of thumb, anything important about the concerns of competent lawyers or their clients. . . . [I]t should [therefore] be irrelevant to a *Strickland* analysis.").

and "that alone mandates vacatur and remand." *Id.*; *see also Kimmelman*, 477 U.S. at 378 (rejecting *per se* rule that carved out Fourth Amendment-related advice from ineffectiveness review, in federal habeas corpus proceedings). Instead, "the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." *Roe*, 528 U.S. at 479.

2. *Strickland* is explicit on its reasons for rejecting static, categorical Sixth Amendment rules such as the collateral consequences doctrine. Fundamentally, the rejection of bright-line rules is necessary because "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." 466 U.S. at 688–89. Each case and each defendant is unique, and "an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 693.

The legal profession has long recognized that "[n]o code or set of rules can be framed, which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life." ABA Canons of Prof'l Ethics pmbl. (1908). As the nation's first code of lawyer ethics stated, "[w]hat is right and proper must . . . be ascertained in view of the peculiar facts [of the case], in the light of conscience." Code of Ethics (Ala. State Bar Ass'n 1887); *see also* Carol Rice Andrews et al., *Gilded Age Legal Ethics: Essays on Thomas Goode Jones' 1887 Code and the Regulation of the Profession* (2003) (discussing monumental achievement and influence of the 1887 code). Following this open-

textured conception of attorney competence, modern ABA and state rules of professional conduct—rules to which this Court has repeatedly looked in ascertaining attorney competence in the ineffective-assistance context, *see infra* note 5—generally leave the ultimate question of adequate performance to reasonableness under all the circumstances. *See, e.g.*, Model Rules of Prof'l Conduct R. 1.1 ("Competent representation requires the legal knowledge, skill, thoroughness and preparation *reasonably necessary* for the representation.") (emphasis added).

3. Petitioner's case highlights four distinct problems with the collateral consequences doctrine as it is applied to attorney performance under *Strickland*. *First*, the doctrine does not permit distinctions between more and less severe collateral consequences. *Second*, the doctrine does not admit of differences between types of deficient attorney performance. *Third*, the doctrine does not allow for the evolution of attorney performance standards as the underlying substantive law changes. *Fourth*, by excluding whole categories of conduct from effective review, the doctrine opens the field for unconstitutional conduct.

a. This Court has often recognized the unique severity—and consequent importance to defendants—of deportation, explaining that it is the "equivalent of banishment or exile." *Costello v. INS*, 376 U.S. 120, 131 (1964); *see also, e.g.*, *Lehmann v. United States ex rel. Carson*, 353 U.S. 685, 691 (1957) (Black, J., concurring) ("To banish [individuals] from home, family, and adopted country is punishment of the most drastic kind."); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (deportation deprives a person of "all that makes life worth living"). Recently, this Court has described immigration consequences as

one of the "principal" issues affecting an immigrant's decision on "whether to accept a plea offer or instead to proceed to trial." *INS v. St. Cyr*, 533 U.S. 289, 323 (2001). Even most jurisdictions that follow the collateral consequences doctrine recognize the unique severity of deportation. *See, e.g.*, *Rubio v. State*, 194 P.3d 1224, 1230 (Nev. 2008) (stating that, "[l]ike other jurisdictions, we recognize the particularly harsh and penal nature of deportation") (citing cases). Indeed, authorities of every stripe—including the American Bar Association,[5] criminal defense and

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[5] ABA Standards for Criminal Justice: Pleas of Guilty, Standard 14-3.2(f) & cmt. at 126 (3d ed. 1999). These Standards are especially noteworthy, because this Court has regularly looked to them in determining prevailing professional norms in the Sixth Amendment context. *See Strickland*, 466 U.S. at 688; Reply Br. of Pet'r at 11 n.2, *Padilla v. Kentucky*, No. 08-651 (Feb. 3, 2009) (citing cases); *Florida v. Nixon*, 543 U.S. 175, 191 (2004). *But see Roe*, 528 U.S. at 479 ("'[P]revailing norms of practice as reflected in the American Bar Association standards and the like . . . are only guides.'") (quoting *Strickland*, 466 U.S. at 688). The state courts also have regularly looked to the ABA Standards for Criminal Justice, and often specifically to the Pleas of Guilty standards, in evaluating attorney conduct for ineffectiveness. *See, e.g.*, *State v. Donald*, 10 P.3d 1193, 1198–99 (Ariz. Ct. App. 2000); *People v. Barocio*, 264 Cal. Rptr. 573, 577, 579 (Cal. Ct. App. 1989); *MacDonald v. State*, 778 A.2d 1064, 1071–72, 1075 (Del. 2001); *Cottle v. State*, 733 So. 2d 963, 966 (Fla. 1999); *People v. Manning*, 883 N.E.2d 492, 502 (Ill. 2008); *Lagassee v. State*, No. CR-92-407, 1993 Me. Super. LEXIS 236, at *2–5 (Me. Sup. Ct. Sept. 23, 1993); *Commonwealth v. Stanton*, 317 N.E.2d 487, 490 n.3 (Mass. App. Ct. 1974); *State v. Loyd*, 190 N.W.2d 123, 124 (Minn. 1971); *State v. Paredez*, 101 P.3d 799, 805 (N.M. 2004); *People v. Reyes*, No. 678195, 2006 WL 3891499, at *6 (N.Y. Sup. Ct. Dec. 14, 2006); *State v. Yanez*, 782 N.E.2d 146, 154–55 (Ohio Ct. App. 2002); *Harris v. State*, 875 S.W.2d 662, 665 (Tenn. 1994); *State*

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public defender organizations,[6] authoritative treatises,[7] and state and city bar publications[8]—

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v. Bean, 762 A.2d 1259, 1266 (Vt. 2000); *Booker v. Commonwealth*, No. 1325-07-2, 2008 WL 926246, at *3 (Va. Ct. App. Apr. 8, 2008); *In re Pers. Restraint of Stenson*, 16 P.3d 1, 15–16 (Wash. 2001).

6 *See, e.g.*, *Assigned Counsel Manual: Policies and Procedures*, ch. IV, Guidelines Governing Representation of Indigents in Criminal Cases § 5.4(o) (Mass. Comm. for Public Counsel Servs. 2009); Performance Guidelines for Criminal Defense Representation §§ 6.2–6.4 (Nat'l Legal Aid and Defender Ass'n 1997); Performance Guidelines for Criminal Defense Representation §§ 6.2–6.4 (N.M. Pub. Defender Dep't 1998); Scott E. Bratton & Elizabeth Kelley, *Representing a Noncitizen in a Criminal Case*, Champion, Jan./Feb. 2007, at 61 (Nat'l Ass'n of Criminal Def. Lawyers).

7 *See, e.g.*, Norton Tooby, *Criminal Defense of Immigrants* § 1.3 (3d ed. 2003); Nat'l Lawyers Guild, *Immigration Law and Crimes* §§ 4:7, 7:21 (2008); Thomson Reuters/West, 2 *Crim. Prac. Manual* §§ 45:3, 45:15 (2009).

8 Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases § 2.8 (Or. State Bar 2007); Brian Bates, *Good Ideas Gone Bad: Plea Bargains and Resident Aliens*, 66 Tex. B.J. 878, 882 (Nov. 2003); Comm. on Criminal Justice Operations, *The Immigration Consequences of Deferred Adjudication Programs in New York City*, 62 Rec. 312, 324 (2007) (Ass'n of The Bar of the City of New York); David C. Koelsch, *Proceed with Caution: Immigration Consequences of Criminal Convictions*, 87 Mich. B.J. 44, 46 (2008); Fernando A. Nunez, *Collateral Consequences of Criminal Convictions to Noncitizens*, 41 Md. B.J. 40, 42 (2008); Eric Pinkard, *Representing the Foreign National in Criminal Court: Deportation Consequences of a Criminal Conviction and Overcoming Problems of Communication*, 73 Fla. B.J. 16, 22 (1999); Maria Baldini-Poterman & Mary M. O'Leary, *Five Things Every Lawyer*

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universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients, such as Petitioner, in recognition of the importance of deportation consequences to defendants in deciding whether to plead guilty or go to trial.[9] But the collateral consequences doctrine admits of no distinctions between an attorney's failure to advise on this most significant consequence, and the failure to advise on relatively minor consequences such as the loss of a driver's license.

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Should Know About Immigration Law, Chi. Bar Ass'n Record, Nov. 2003, at 42; Steve Brazelton, *Immigration Pitfalls of the Plea Bargain: Criminal Attorneys Beware*, Nev. Law., Nov. 1999, at 13 (Nev. Bar Ass'n); Allen C. Ladd, *Protecting Your Non-Citizen Client From Immigration Consequences of Criminal Activity*, S.C. Law., May 2004, at 44 (S.C. State Bar); *see also* Michael G. Balocca, *Bar Actions: Discipline*, Or. St. B. Bull., Apr. 2007, at 44, 44–45 (one year suspension for "lack[ ] [of] competence" for, *inter alia*, failure to advise on deportation consequences).

[9] In addition, a majority of states and the District of Columbia now require, as a matter of state law, that the *courts* inform defendants of such consequences at the plea colloquy. *See Certiorari Amicus* Brief of Law Professors at 17 (citing statutes and rules in 23 states and the District of Columbia); Alaska R. Crim. P. 11(c)(3)(C); Iowa R. Crim. P. 2.8(2)(b)(3); Vt. Stat. Ann. tit. 13, § 6565(c)(1) (2009). These statutes and rules are not a replacement for attorney advice, insofar as the court cannot effectively counsel or strategize with the defendant in the same way as would his attorney. *See infra* pp. 21–22. But they do provide further evidence of the material importance of deportation consequences for the defendant in deciding whether and how to plead.

b. In addition, the collateral consequences doctrine admits of no distinctions between different types of deficient attorney performance (e.g., ignorance of a material fact or law, failing to provide advice, failing to provide advice once informed of its importance, providing incorrect advice, etc.). In the deportation consequences context, it is abundantly clear that a lawyer is "egregiously derelict in the discharge of his duty to his client" where he gives wrong advice contrary to the deportation statute. *United States v. Parrino*, 212 F.2d 919, 925 (2d Cir. 1954) (Frank, J., dissenting); *id.* at 924 (incorrect advice regarding deportation "disclose[d] unmistakably glaring incompetence on the part of that lawyer"). Judge Frank's position has been regularly endorsed by virtually every authority since.[10] As the dissent below recognized, "[c]ounsel who gives erroneous advice to a client which influences a felony conviction is worse than no lawyer at all. Common sense dictates that such deficient lawyering goes to effectiveness." *Padilla*, 253 S.W.3d at 485 (Cunningham, J., dissenting). Yet honest application of the collateral consequences doctrine—which does not distinguish

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10 *See* 8A James Wm. Moore, *Moore's Federal Practice* ¶ 32.07 [3b], at 32-80 (Cipes ed. 1969) ("[T]he vigorous dissent of Judge Frank more likely reflects the present attitude of the . . . judiciary."), *quoted in United States v. Briscoe*, 432 F.2d 1351, 1353–54 (D.C. Cir. 1970); *Strader v. Garrison*, 611 F.2d 61, 64 (4th Cir. 1979) (same); *Rubio v. State*, 194 P.3d 1224, 1230–31 n.36 (Nev. 2008) (citing numerous cases from the 1980s, 1990s, and 2000s); *United States v. Couto*, 311 F.3d 179, 188 (2d Cir. 2002) ("[A]n affirmative misrepresentation by counsel as to the deportation consequences of a guilty plea is today objectively unreasonable.").

between various shades of attorney performance on the identical "collateral" matter—replaces this common sense notion with the fiction that even gross misadvice is categorically unrelated to attorney ineffectiveness.

c. The interaction of the collateral consequences doctrine with the changes to immigration laws at issue in Petitioner's case illustrates a third problem: that the collateral consequences doctrine fails to evolve with the substantive law, and thus fails to adequately gauge the severity of counsel's errors. Before enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, 110 Stat. 3009-546, deportation was triggered by only a small set of offenses, and even in those cases defendants could apply for equitable waivers of deportation, which were regularly granted. *See* Rob A. Justman, Comment, *The Effects of AEDPA and IIRIRA on Ineffective Assistance of Counsel Claims for Failure to Advise Alien Defendants of Deportation Consequences of Pleading Guilty to an "Aggravated Felony,"* 2004 Utah L. Rev. 701, 702, 705–08 (2004). Against this backdrop, most courts held that attorneys were not required to advise concerning deportation consequences. *See id.* at 712–13.

When the law was changed to eliminate waivers of deportation and to significantly expand the class of deportable offenses to include even some misdemeanors, *see, e.g.*, *United States v. Christopher*, 239 F.3d 1191, 1194 (11th Cir. 2001) (misdemeanor shoplifting is an "aggravated felony" triggering deportation), it would only have been proper under

Strickland—and a matter of common sense—for courts to take this change into account in determining whether counsel was ineffective. *See United States v. Couto*, 311 F.3d 179, 188 (2d Cir. 2002) (acknowledging that in a case of failure to advise the court might "reconsider whether the standards of attorney competence have evolved to the point that a failure to inform a defendant of the deportation consequences of a plea would by itself now be objectively unreasonable"). But instead, the majority of lower courts have formalistically reaffirmed their prior holdings, notwithstanding the material change in substantive law. *See, e.g.*, *United States v. Gonzalez*, 202 F.3d 20 (1st Cir. 2000); *Rumpel v. State*, 847 So. 2d 399 (Ala. Crim. App. 2002); *see also* Justman, *supra*, at 729–30 (citing cases). In this way, the collateral consequences doctrine (and similar bright-line rules) effectively ossify the standards governing attorney conduct, foreclosing the contextual inquiry that the Sixth Amendment and the real-world practice of law require.

d. Finally, where (as here) the bright-line rule categorically *excludes* conduct from meaningful reasonableness review, there is a particular and significant risk that counsel may engage in egregious behavior, under the circumstances, without any recourse for the client. *See Arizona v. Gant*, No. 07–542, 556 U.S. ___, ___ (2009) (slip op. at 4) (Scalia, J., concurring) (declining to adopt broad rule in the Fourth Amendment context that "opens the field to what I think [is] plainly unconstitutional [conduct]"). This Court recognized that problem in *Kimmelman v. Morrison*, where it examined a bright-line rule carving out from ineffective-assistance review all claims arising out of Fourth Amendment-related ineffectiveness, in federal habeas corpus proceedings.

477 U.S. 365, 381 (1986). The Court rejected this *per se* treatment of attorney performance because to do otherwise would "deny all defendants" whose counsel performed inadequately with respect to this class of issues "the opportunity to protect their right to effective . . . counsel" under any circumstances. *Id.* at 378.

C. The Collateral Consequences Doctrine Is Inconsistent With Counsel's Sixth Amendment Responsibilities In Ensuring A Voluntary And Intelligent Guilty Plea

1. In carving out collateral consequences from the scope of the Sixth Amendment, the lower courts have frequently borrowed a concept from an area of law that diverges in critical respects from this Court's Sixth Amendment jurisprudence. Due Process requires federal trial courts to ascertain whether a guilty plea is made "voluntarily . . . and with full understanding of the consequences." *Kercheval v. United States*, 274 U.S. 220, 223 (1927); *see also McCarthy v. United States*, 394 U.S. 459, 466 (1969) ("[I]f a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void."). In *Boykin v. Alabama*, 395 U.S. 238 (1969), this Court held that, in discharging that function, a court "cannot presume a waiver of . . . important federal rights from a silent record," *id.* at 243, and that the Due Process Clause accordingly forbids a trial court from accepting a defendant's guilty plea "without an affirmative showing that [the plea] was intelligent and voluntary," *id.* at 242. *Boykin* thus required trial courts to canvass the guilty plea with the accused on the re-

cord, both "to make sure he has a full understanding of what the plea connotes and of its consequence," and to "leave[] a record adequate for any review that may be later sought." *Id.* at 244.

This Court clarified the scope of a trial court's Due Process duties in the plea setting in a trilogy of cases decided a year later. In *McMann v. Richardson* and *Parker v. North Carolina*, this Court held that a guilty plea is not involuntary or unintelligent—and thus the trial court is not prohibited from accepting it—where the plea was motivated by an earlier, allegedly coerced confession, as long as the guilty plea itself was a voluntary act, entered with the advice of competent counsel and with an awareness of the relevant circumstances and likely consequences of the plea. 397 U.S. 759, 767–68 (1970); 397 U.S. 790, 796 (1970). And in rejecting a voluntariness challenge to a plea in *Brady*, this Court stated that, in canvassing the consequences of a plea, Due Process requires trial judges to advise defendants only on *direct* consequences—i.e., consequences that are imposed directly by the trial court, *see infra* note 19—and not collateral consequences. *Brady v. United States*, 397 U.S. 742, 755 (1970). These constitutional standards are now incorporated in Federal Rule of Criminal Procedure 11(b).[11]

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[11] In entertaining challenges to guilty pleas premised on non-advice as to a collateral consequence of the plea, courts generally do not differentiate between Due Process and Rule 11 duties, insofar as compliance with Rule 11 establishes a "presumption that the plea is constitutionally adequate" for the purposes of Due Process. *See Downs-Morgan v. United States*, 765 F.2d 1534, 1541 n.14 (11th Cir. 1985). We refer herein to both duties as courts' "*Boykin/Brady*" duties. While state

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But the Sixth Amendment—as distinct from a trial judge's *Boykin/Brady* duties—is animated not by the court's obligation to ensure that the defendant voluntarily and intelligently accepts the penalties that the court imposes, but by counsel's obligation to ensure that his client intelligently evaluates whether and how to plead in the first place, in light of the advantages and disadvantages of the plea for that client. *See Libretti v. United States*, 516 U.S. 29, 50 (1995) ("Apart from the small class of rights that require specific advice from the court under Rule 11(c), it is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement."); *Lockhart*, 474 U.S. at 56 (differentiating between court's *Boykin/Brady* obligations and counsel's obligations under the Sixth Amendment). Indeed, a significant part of the reason that the court's role in advising on the consequences of the plea is so limited is *because* "counsel and not the court has the obligation of advising [the defendant]" of collateral consequences that may be important to his decision. *Michel v. United States*, 507 F.2d 461, 465 (2d Cir. 1974).[12] In light of this distinction be-

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courts are not bound by the Federal Rules of Criminal Procedure, nearly all states have state-law analogs to Rule 11, *see, e.g.*, Ky. R. Crim. P. 8.08, and state courts must in any event follow the constitutional dictates of *Boykin/Brady*.

[12] The *Brady* trilogy itself makes clear that the court's role in ensuring a voluntary and intelligent plea is premised upon the competency of counsel. *See Parker*, 397 U.S. at 797–98 (finding plea intelligent because "the advice [defendant] received was well within the range of competence required of attorneys"); *McMann*, 397 U.S. at 770 ("[A] defendant's plea of guilty based

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tween the role of courts and counsel in the plea setting, it makes little sense for a doctrine that limits the obligations of the court to be employed in analyzing the performance of counsel.[13]

The overarching distinctions between the responsibilities of counsel and the court make clear why counsel's role extends to consultation and advice on guilty plea consequences that need not be addressed by the court. Counsel's basic duty of competency encompasses duties "to perform . . . appropriate factual research [and] legal analysis, and [to] exercise . . . professional judgment" in consulting with and advising the client, Restatement (Third) of the Law Governing Lawyers § 16 cmt. d (2000), none of which are applicable to the court. As this Court observed in *Powell v. Alabama*, 287 U.S. 45, 61 (1932), "[H]ow can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? . . . He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between

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on reasonably competent advice is an intelligent plea."); *Brady*, 397 U.S. at 754 (finding plea voluntary because defendant "had competent counsel and full opportunity to assess the advantages and disadvantages of a trial as compared with those attending a plea of guilty").

[13] This Court's recognition of the distinction between the roles of courts and counsel in the plea setting is a particular manifestation of a larger truth: that the Sixth Amendment overlaps with, but is at times broader than, the Fifth. *See, e.g.*, *Wade*, 388 U.S. at 223–27, 237 (rejecting Fifth Amendment self-incrimination claim while granting Sixth Amendment right to counsel claim, and discussing relationship between the two).

counsel and accused which sometimes partake of the inviolable character of the confessional." In the context of inadequate fact investigation in particular, this Court has regularly found constitutionally ineffective assistance of counsel, notwithstanding the absence of a similar duty for the courts. *See, e.g.*, *Wiggins*, 539 U.S. at 521–27; *Williams*, 529 U.S. at 395–96; *Kimmelman*, 477 U.S. at 385.

In the plea setting, these broad norms of attorney competency are manifest in ways that are clearly distinct from, and in many ways broader than, the responsibilities of the court. Counsel has an obligation to conduct at least a minimal fact investigation in advance of the plea; to familiarize himself with relevant law; to learn the client's priorities (avoiding jail time, avoiding deportation, etc.); and to advise the client as to the best course of action in the face of the evidence mustered by the State, the range of possible sentences and other consequences, and the prosecutor's tender. The court has no such obligations, and is not institutionally capable of performing such a role. *See* ABA Standards for Criminal Justice: Pleas of Guilty, Standard 14-3.2 cmt. at 118 (3d ed. 1999) ("[T]he court['s] inquir[y] . . . into the defendant's understanding of the possible consequences [of the plea] . . . is not, of course, any substitute for advice by counsel. The court's warning comes just before the plea is taken, and may not afford time for mature reflection. The defendant cannot, without risk of making damaging admissions, discuss candidly with the court the questions he or she may have.").

As such, the lower courts that have deemed the scope of a counsel's duties under *Strickland* and its progeny coextensive with a trial court's duties under

the Due Process Clause have erred. The early Sixth Amendment ineffective assistance of counsel cases decided in the wake of *Brady*, in fact, regularly recognized the distinction between the court's *Boykin/Brady* obligations and those of counsel under the Sixth Amendment, *see, e.g.*, *Michel*, 507 F.2d at 463; *Colson v. Smith*, 438 F.2d 1075, 1079 (5th Cir. 1971); *Tafoya v. State*, 500 P.2d 247, 251 (Alaska 1972), and distinguished earlier cases that had examined the performance of counsel under the Due Process Clause, rather than the Sixth Amendment. *See, e.g.*, *Strader*, 611 F.2d at 64 (distinguishing two earlier collateral consequences cases because "[i]n neither case was the problem approached in terms of the constitutional entitlement to the effective assistance of counsel"); *People v. Pope*, 590 P.2d 859, 864–65 (Cal. 1979) (same); *see also United States v. Mora-Gomez*, 875 F. Supp. 1208, 1213 (E.D. Va. 1995) (discussing cases).[14] Nevertheless, over time, as more and more courts mechanically imported the collateral consequences doctrine from its *Boykin/Brady* roots into the Sixth Amendment ineffective assistance of counsel context, these critical distinctions were more often than not overlooked.

2. Because the collateral status of a consequence for *Boykin/Brady* purposes has little or no relation-

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[14] Many of these courts nevertheless denied ineffective assistance of counsel claims because the failure to advise as to deportation and similar collateral consequences did not make a "farce and mockery" of the proceeding. *See, e.g.*, *Tafoya*, 500 P.2d at 252; *Vizcarra-Delgadillo v. United States*, 395 F.2d 70, 71 (9th Cir. 1968). This Court's holding in *Strickland* supplanted the "farce and mockery" standard. *See* 466 U.S. at 696–97.

ship to the importance of that consequence to a particular defendant, those consequences cannot and should not be categorically excised from the Sixth Amendment. In the plea context, sufficiency of counsel is inexorably linked to the critical decision that the defendant must make: whether to plead guilty (and thereby relinquish a panoply of constitutional rights) or proceed to trial. Where an attorney does not provide advice sufficient for the client to approach this critical decision intelligently, the plea can be invalidated. *See McMann v. Richardson*, 397 U.S. 759, 770–71, 774 (1970).

A plea is "intelligent" where a defendant possesses the information or understanding necessary to weigh the advantages of a plea against the advantages of trial, and choose between the two, in light of the likely consequences of a guilty plea. *Brady*, 397 U.S. at 748 ("Waivers of constitutional rights . . . must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."); *see also Wofford v. Wainwright*, 748 F.2d 1505, 1508–09 (11th Cir. 1984) ("[T]he accused [must be able to] make an informed and conscious choice between accepting the prosecution's offer and going to trial."); *Hawkman v. Parratt*, 661 F.2d 1161, 1170 (8th Cir. 1981) ("A guilty plea must represent the informed, self-determined choice of the defendant among practicable alternatives."). An intelligent plea is therefore "the culmination of a rational decision-making process, in which the accused assesses the numerous factors which bear upon his choice of whether to formally admit his guilt or to put the State to its proof." *Healey v. United States*, 553 F.2d 1052, 1056 (7th Cir. 1977).

This standard is necessarily personal and circumstance-dependent, and conditions intelligence on the individual defendant's ability to understand and assess the advantages and disadvantages of the plea in light of the factors most important to that particular defendant. *See Adams v. United States ex rel. McCann*, 317 U.S. 269, 278 (1942) ("[W]hether or not there is an intelligent, competent, self-protecting waiver of jury trial by an accused must depend upon the unique circumstances of each case."); *cf. Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) ("The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.").

In light of the legal intricacies and strategic considerations that are often involved in ascertaining and understanding the advantages and disadvantages of a plea, "an intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney." *Brady*, 397 U.S. at 748 n.6; *see also* ABA Standards for Criminal Justice: Pleas of Guilty, Standard 14-3.2 cmt. at 117 (1999) ("[T]he system relies, at heart, on defense counsel to ensure that a defendant's guilty plea is . . . entered in his or her best interests."). The defendant "needs the aid of counsel [at the plea stage] lest he be the victim of overzealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment." *Williams v. Kaiser*, 323 U.S. 471, 476 (1945). As a result of these impediments, "[o]nly counsel [can] discern from the facts whether a plea of not guilty to the offense charged or a plea of guilty to a lesser offense would be appropriate." *Id.* at 475–76.

It is for these reasons that "an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered." *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948); *see also Hamilton v. Alabama*, 368 U.S. 52, 55 (1961) ("Only the presence of counsel could have enabled th[e] accused to . . . plead intelligently."). Therefore, the attorney "must actually and substantially assist his client in deciding whether to plead guilty[,] . . . [with] advice [sufficient to] permit the accused to make an informed and conscious choice." *Herring v. Estelle*, 491 F.2d 125, 128 (5th Cir. 1974); *see also Colson*, 438 F.2d at 1079 ("[I]t [i]s obvious that the Supreme Court envisioned a system under which the defendant, advised by reasonably competent counsel, makes an informed and conscious choice."). Whether that assistance relates to matters considered collateral with respect to the duties of the court is irrelevant: because an intelligent choice in the plea setting is context- and person-specific, *see Adams*, 317 U.S. at 278; *Johnson v. Zerbst*, 304 U.S. at 464, a competent attorney must reasonably advise on the advantages, disadvantages, and consequences of import to that particular defendant. The Sixth Amendment does not support a more rigid or formalistic conception of the attorney's duties at the plea stage.

II. Application Of *Strickland*'s Context-Dependent Test To Collateral Consequences Advice Will Not Prove Burdensome Or Unworkable

Because collateral consequences abound,[15] and because a large percentage of cases end in a plea,[16] some lower courts have expressed concern that the application of *Strickland*'s context-dependent test to collateral consequences-related advice will prove burdensome for courts and counsel. Of course, "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of [defendants' constitutional rights]." *Mincey v. Arizona*, 437 U.S. 385, 393 (1978), *quoted in Gant*, 556 U.S. at ___ (slip op. at 16). But even examined purely through the lens of administrability, application of *Strickland*'s objective reasonableness standard to collateral consequences-related advice does not raise serious concerns.

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[15] One recent study identified eight primary categories of collateral consequences: employment, education, government benefits, financial, housing, family, civic, and immigration consequences. *See* N.Y. State Bar Ass'n, *Report and Recommendations of the Special Committee on Collateral Consequences of Criminal Proceedings* (2006).

[16] *See* U.S. Dep't of Justice, Bureau of Justice Statistics, *Federal Justice Statistics*, 2005, at 5 tbl.8 (2008) (86% of federal cases ended in a plea in 2005).

A. Application Of *Strickland*'s Context-Dependent Test To Collateral Consequences Advice Will Not Create Undue Burdens For The Courts

Given that defendants for whom collateral consequences are of grave import already routinely raise ineffective assistance of counsel claims when they have not been properly advised on those consequences, *see* Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions*, 86 B.U. L. Rev. 623, 639–647 (2006) (citing and discussing cases), there is no readily apparent reason to believe that application of *Strickland* to collateral consequences advice will materially increase the number of such claims brought in the lower courts.[17] And for those claims that are brought, *Strickland*'s prejudice prong stands as an effective and efficient bar to relief in all but the most deserving cases. *See* Chin & Holmes, *supra* note 4, at 739.

Under *Strickland*'s prejudice prong, courts can expediently dispose of non-meritorious ineffective

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[17] Despite the fact that the overwhelming majority of convictions are by guilty plea, most post-conviction claims are filed by habeas petitioners who have been convicted at trial rather than by plea. *See* Victor E. Flango, *Habeas Corpus in State and Federal Courts* 36–38 (Nat'l Ctr. for State Courts 1994) (discussing studies showing that most habeas corpus petitions—66% of those filed by state prisoners, and 74% of those filed by federal prisoners, according to the author's own analysis—are filed by prisoners who have been convicted at trial, and explaining findings as a function of the messier nature of trial convictions).

assistance of counsel claims without even reaching the question of attorney performance, *see Strickland*, 466 U.S. at 697, an especially powerful tool in the plea context. Prejudice exists in that setting only where there is "a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty" to the offense charged. *Lockhart*, 474 U.S. at 59. So, for example, a defendant who has pleaded guilty to a violent offense such as murder, assault, or rape, and has received a decades-long sentence, likely will have great difficulty demonstrating that his plea decision would have been materially altered if he had known of any of the myriad collateral consequences that accompanied it.[18] By the same token, the less objectively important a collateral consequence—for instance, loss of a driver's license—the less likely it is that a defendant could show that attorney advice would have impacted the decision whether to plead guilty. In the ordinary course, then, only a small slice of claims are likely to get past the prejudice prong to be judged on the merits: those in which a defendant pleaded guilty to an offense that does not carry an especially severe sentence, a serious collateral consequence flowed from that plea (e.g., automatic deportation), and the defendant's attorney failed to provide advice, or provided misadvice, on that consequence. *See, e.g.*, *Sial*

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[18] Serious offenders with lengthy sentences are a significant majority of habeas petitioners. *See* Flango, *supra* note 17, at 35–38; *see also* U.S. Dep't of Justice, Bureau of Justice Statistics, *Federal Habeas Corpus Review: Challenging State Court Criminal Convictions* 11 (1995) (62% of petitioners challenging state convictions on federal habeas review were convicted of homicide, rape, sexual abuse, robbery, or kidnapping).

v. State, 862 N.E.2d 702 (Ind. Ct. App. 2007) (finding prejudice where defendant was not advised as to deportation consequences of theft charge carrying eighteen-month sentence).

For claims that do get through *Strickland*'s prejudice prong, the courts will apply a standard that is no less workable—and, in fact, more straightforward—than the "bright-line" collateral consequences rule. Reasonableness under the circumstances tests are commonplace in constitutional criminal procedure, and *Strickland*'s two-part test is both well-settled and well-understood. In applying that test, courts remain free to develop and employ rules of thumb that operate within *Strickland*'s case-by-case framework to aid in the efficient evaluation of claims. *See, e.g.*, *Roe*, 528 U.S. at 481 (rejecting *per se* rule while stating that "[w]e expect that courts evaluating the reasonableness of counsel's performance using [*Strickland*] . . . will find, in the vast majority of cases, that counsel had a duty to consult with the defendant about an appeal"); *see also United States v. Banks*, 540 U.S. 31, 36 (2003) (while reasonableness under Fourth Amendment requires "examining the totality of circumstances[,]" this Court has "pointed out factual considerations of unusual . . . significance" that, while "not dispositive[,]" provide a helpful framework for the evaluation of individual claims).

Indeed, the application of *Strickland*'s settled test to collateral consequences-related advice will actually *eliminate* many burdens that now plague lower courts under the collateral consequences doctrine. The collateral consequences bright line is "not easily drawn," *Ex parte Morrow*, 952 S.W.2d 530, 539 (Tex. Crim. App. 1997) (Baird, J., dissenting), and

the persistence of the doctrine has created a multitude of splits of authority and unwieldy issues of definition and application. Three widely-used definitions of "direct" and "collateral," for example, currently compete in *Strickland* cases in the lower courts.[19] Under any given definition, courts sometimes disagree about whether to place particular consequences in one category or the other, creating subsidiary splits.[20] Courts also have struggled with whether and how to adopt a "misadvice exception" to the collateral consequences doctrine.[21] And courts that have done so grapple further with whether that exception applies only to "gross misadvice" or to sim-

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[19] *Compare, e.g.*, *United States v. Salerno*, 66 F.3d 544, 551 (2d Cir. 1995) ("[D]irect [versus] collateral depends on whether the undesired consequence is *definite, immediate, and largely automatic*.") (quotation marks omitted) (emphasis added), *with, e.g.*, *State v. Rojas-Martinez*, 125 P.3d 930, 933 (Utah 2005) ("[A] consequence is collateral if *an agent independent of the court* . . . must act to cause that consequence.") (emphasis added), *and with, e.g.*, *United States v. Romero-Vilca*, 850 F.2d 177, 179 (3d Cir. 1988) ("[A] collateral consequence is [any] one that is not related to the length or nature of the sentence imposed on the basis of the plea.").

[20] For instance, there is a split between the Fourth Circuit and "the majority of circuits deciding the issue" on whether parole ineligibility is a collateral or direct consequence of a plea, giving rise to an ineffective assistance of counsel claim. *See Bustos v. White*, 521 F.3d 321, 325–26 (4th Cir. 2008).

[21] *Compare, e.g.*, *Downs-Morgan*, 765 F.2d at 1540–41 (declining to adopt blanket misadvice exception to collateral consequences doctrine), *with, e.g.*, *Ostrander v. Green*, 46 F.3d 347, 355 (4th Cir. 1995) (adopting blanket exception), *overruled on other grounds by O'Dell v. Netherland*, 95 F.3d 1214, 1222–1223 (4th Cir. 1996).

ple "erroneous advice" as well.[22] Courts often further divide on the boundaries of these subcategories. *See Hornak v. Warden*, 488 A.2d 850, 852 (Conn. Super. Ct. 1985) ("[T]here is a division of authority on what constitutes gross misadvice."); *see also State v. Sharkey*, 927 A.2d 519, 523 (N.H. 2007) ("Although numerous federal courts have used the 'gross misinformation' standard, there has been no conclusive definition of the term.").

These difficulties with the supposedly bright line of the collateral consequences doctrine are indicative of the problem—repeatedly acknowledged and warned against by this Court—of adopting rigid *per se* rules for Sixth Amendment ineffective assistance of counsel claims. Rejection of that doctrine and application of *Strickland*'s context-dependent test to attorney advice on collateral consequences would eliminate these difficulties in favor of this Court's well-settled, common sense, and easily-applied standard: objective reasonableness under the circumstances, in light of prevailing professional norms.

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22 *Compare, e.g.*, *Strader*, 611 F.2d at 65 (standard for ineffective assistance on parole eligibility is "gross misadvice"), *with, e.g.*, *Garmon v. Lockhart*, 938 F.2d 120, 121 (8th Cir. 1991) (simple "erroneous advice" concerning parole eligibility may be sufficient).

B. Compliance With *Strickland*'s Rule Of Reasonableness On Collateral Consequences Advice Will Not Unduly Burden Criminal Defense Lawyers

Strickland requires only *reasonable* performance under the circumstances. *See* 466 U.S. at 688–91. Given that there are only a limited number of collateral consequences that will be important to most defendants, *see* Chin & Holmes, *supra* note 4, at 737–38, and given the practical limitations of real-world practice, a defense attorney need not advise every client on every remote or insignificant collateral consequence under *Strickland*. To fulfill his Sixth Amendment obligations in the ordinary case, the attorney would need to ask only a few basic questions regarding immigration status, prior convictions, and government benefits when first meeting with a client. *See id.* at 738. The attorney also would need to conduct reasonable legal research.[23] Then, based on what he has learned, he would need to reasonably advise the client as to potential collateral consequences of note. *See* ABA Standards for Criminal Justice: Pleas of Guilty, Standard 14-3.2(f) (3d ed. 1999) ("*To the extent possible*, defense counsel should

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[23] The attorney would be able to complete the necessary legal research quickly and inexpensively in most cases, as practice guides and handbooks abound that detail the relevant federal and state laws regarding collateral consequences. *See, e.g.*, U.S. Dep't of Justice, *Federal Statutes Imposing Collateral Consequences Upon Conviction* (2000); Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide* (2006).

determine and advise the defendant . . . as to the possible collateral consequences that might ensue from entry of the contemplated plea.") (emphasis added). Reasonable fact investigation, legal research, and advice are already obligations under undisputed professional norms. *See supra* pp. 21–22.

Reasonableness is the measure: An attorney is not required to advise as to every collateral consequence any more than he is required to find every potentially helpful fact or case, choose the absolute best strategy, execute that strategy perfectly, intuit that his client is lying or hiding material information, or divine unspoken, unusual preferences on the part of the client. *See Strickland*, 466 U.S. at 688–91. In this way, *Strickland*'s contextual standard will serve an important limiting function with respect to collateral consequences-related attorney duties.

CONCLUSION

The judgment of the Supreme Court of Kentucky should be reversed.

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
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In the Supreme Court of the United States

JOSE PADILLA, PETITIONER

v.

COMMONWEALTH OF KENTUCKY, RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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QUESTIONS PRESENTED

1. Whether a State has an affirmative duty, as a condition of preserving a duly entered guilty plea, to provide counsel to investigate and advise a criminal defendant in state court of collateral consequences, such as deportation, that may result from the plea.

2. Assuming there is no such affirmative duty, whether "gross misadvice" regarding a collateral consequence of a plea, such as deportation, can constitute ineffective assistance of counsel under the Sixth Amendment, and thereby entitle the defendant to vacatur of the plea.

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

As this court has recognized, plea agreements are the backbone of "the orderly administration of justice" in this country. *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979). Indeed, in the state courts—which typically account for over ninety percent of all felony convictions in the United States—plea agreements make up the overwhelming majority of those convictions.[2] But if this Court were to adopt Padilla's position, and thereby abolish or weaken the settled rule that those who plead guilty need only understand the *direct* consequences of their pleas—a principle known as the "collateral consequences" rule—that ruling, at least in the States, would likely break the back of the plea agreement system.

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part. No person or entity, other than the *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. NDAA is filing its brief with the consent of all parties. Letters of consent have been lodged with the Court.

[2] Bureau of Justice Statistics, U.S. Dept. of Justice, Criminal Sentencing Statistics, http://www.ojp.usdoj.gov/bjs/sent.htm (last visited Aug. 11, 2009) (number of felony convictions entered in state and federal courts); Administrative Office of the United States Courts, Statistical Tables for the Federal Judiciary, June 30, 2008, Tbl. D4, http://www.uscourts.gov/stats/june08/D04Jun08.pdf (noting that from June 30, 2007 to June 30, 2008, there were 2,585 federal felony convictions entered following trial and 77,962 entered following a plea agreement); Bureau of Justice Statistics, United States Department of Justice, State Court Sentencing of Convicted Felons 2004 - Statistical Tables, Felony Case Processing in State Courts, Tbl. 4.1, http://www.ojp.usdoj.gov/bjs/pub/html/scscf04/tables/scs04401tab.htm (noting that an estimated 95% of state court felony convictions in 2004 were the result of a plea agreement).

Padilla urges the Court to hold that a criminal defendant who knowingly, intelligently, and voluntarily accepted the direct consequences of a plea agreement can unilaterally revoke the bargain he struck with the state upon a showing that he was uninformed or misinformed by counsel about a non-criminal, collateral consequence of his conviction. To be sure, his case arises in the difficult context of deportation, where Congress has made a policy choice against permitting immigrants who engage in criminal conduct to remain in the United States. But the rule Padilla urges cannot in principle be limited to that context. And if this Court follows his suggestion and abolishes or weakens the collateral consequence rule, defendants who have pleaded guilty could soon be empowered to re-open their plea agreements based on a host of collateral consequences, including such things as parole eligibility, firearms privileges, and child custody issues. Moreover, given the enormous numbers of aliens who are charged with crimes in this Nation, even an "exception" limited to deportation and/or affirmative "misadvice" would wreak havoc with the plea agreement system.

Accordingly, the *amici* States have an obvious, powerful interest in this Court's resolution of the questions presented. And the same is true of *amicus* National District Attorneys Association (NDAA), the oldest and largest professional organization representing U.S. criminal prosecutors. NDAA's members are state and local prosecutors who will bear the burden of re-prosecuting thousands of defendants like Padilla if this Court abandons or weakens the collateral consequences rule. *Amici* recognize, of course, that prosecutors considering plea agreements must take into account any undue hardship the plea may

create, and NDAA's officials have spoken out about the sometimes harsh impact of collateral consequences on criminal defendants.[3] These ethical obligations and policy concerns do not, however, add up to a new constitutional right to sound advice from state-paid counsel on the collateral consequences of a criminal conviction—enforceable through vacatur of an otherwise fully informed guilty plea.

STATEMENT

This case is about a confessed drug smuggler who relied on the advice of competent counsel to voluntarily plead guilty in *State* court, in the face of overwhelming evidence against him, and who now seeks to vacate his plea in hopes of escaping the *federal* immigration consequences of his crime.

In September 2001, a Kentucky law enforcement officer stopped Padilla's truck to perform a routine paperwork check. J.A. 47-49. In the subsequent consent-based search, the officer found 23 wrapped Styrofoam boxes that were mysteriously absent from the truck's shipping manifest. R. 33. When he asked Padilla what was in the boxes, Padilla responded, "maybe drugs." *Id.* As it turned out, Padilla was hauling nearly half a ton of marijuana. *Id.*

Represented by a state-paid lawyer who was fully competent in criminal-law matters, Padilla lost his bid to suppress the drugs and the confession. Recognizing that he was left without defenses, and facing

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[3] NDAA, National Prosecution Standards § 68.1, http://www.ndaa.org/pdf/ndaa_natl_prosecution standards_2.pdf; Robert M.A. Johnson, *Message from the President: Collateral Consequences*, THE PROSECUTOR, May 2001, *available at* http://www.ndaa.org/ndaa/about/president_message_may_june_2001.html.

the prospect of a jury that would not take kindly to drug smuggling, he elected to plead guilty to three offenses: misdemeanor possession of marijuana, misdemeanor possession of drug paraphernalia, and felony trafficking in marijuana. R. 34, J.A. 61-68. Padilla's felony drug trafficking conviction carried a maximum sentence of ten years. Ky. Rev. Stat. Ann. § 218A.1421(4)(a); 532.060(2)(c). Padilla, who expressed no dissatisfaction with his counsel's representation at the time, received a sentence of five years in prison and five years probated, with credit for time already served. His prison time was thus only half of what it could have been if he had gone to trial and lost—which was a virtual certainty.

Two years later, in 2004, Padilla filed a pro se motion for postconviction relief under state law. J.A. 71-74. He alleged that he had received constitutionally ineffective assistance of counsel because his attorney told him that his conviction would not affect his immigration status, when in fact, as a felony drug offense, it made him eligible for deportation. J.A. 71-74. Padilla thus argued that his plea was invalid because the assistance he received fell short of that required by the Sixth Amendment. The local Kentucky Circuit Court denied his motion because it found that his plea was "knowing, intelligent, and voluntary." R. 72-76.

The Kentucky Court of Appeals, in a 2 to 1 decision, reversed and remanded the case for an evidentiary hearing to determine whether Padilla had been misadvised, and whether this misadvice had rendered his plea agreement involuntary. Pet. App. 29-40, 36. The Kentucky Supreme Court reversed, holding that collateral consequences of a criminal conviction were "outside the scope of the . . . Sixth Amend-

ment right to counsel" and could not render Padilla's plea involuntary. Pet. App. 23.

SUMMARY OF ARGUMENT

As Kentucky's brief carefully and cogently explains (at 12-23), the "collateral consequences" rule is almost universally accepted, not only in the state courts, but in virtually all the federal circuits. That is because the rule—which limits the Sixth Amendment effectiveness inquiry to the direct consequences of a prosecution—rests on a common-sense principle that helps courts adhere to the text of the Sixth Amendment while honoring the government's interest in finality and efficiency. This court should embrace it.

By its terms, the Sixth Amendment guarantees each criminal defendant "the assistance of counsel for his *defense*" in "all *criminal* prosecutions." U.S. CONST. amend. VI (emphasis added). Thus, an attorney's effectiveness for Sixth Amendment purposes must be evaluated with reference to "the range of competence demanded of attorneys in *criminal cases*." *Hill* v. *Lockhart*, 474 U.S. 52, 57 (1985) (quoting *McMann* v. *Richardson*, 397 U.S. 759, 771 (1970)) (emphasis added). By excluding matters "over which the trial judge has no control and for which he has no responsibility," the collateral consequences rule allows courts to focus on the defense attorney's competence in handling the "criminal prosecution" to which the Sixth Amendment attaches. *United States* v. *Gonzalez*, 202 F.3d 20, 27 (1st Cir. 2000).

The collateral consequences rule also serves the state's strong interest in the finality of plea agreements. As this Court has recognized, "[e]very inroad on the concept of finality undermines confidence in

the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice." *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979) (quoting *United States* v. *Smith*, 440 F.2d 521, 529 (7th Cir. 1971) (Stevens, J., dissenting)). This interest is at its height in the plea agreement context, both because "the vast majority of criminal convictions result from such pleas" and because "the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea." *Id.*

Given the overwhelming number of plea agreements entered in state courts each year (an estimated 1.2 million in 2004),[4] as well as the enormous cost of indigent defense in state courts—more than $2.8 billion in 2002[5]—States and prosecutors have a critical interest in the finality of those pleas. The collateral consequences rule protects this finality interest by preventing convicted criminals from re-opening their pleas based on matters that are outside the scope of the state's criminal prosecution. The rule thus protects the state's interest in an efficient justice system by preventing it from having to pay for counsel to advise defendants on a variety of specialized collateral matters outside the sentencing court's control, and by

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[4] Bureau of Justice Statistics, U.S. Dept. of Justice, Criminal Sentencing Statistics, http://www.ojp.usdoj.gov/bjs/sent.htm (last visited Aug. 11, 2009).

[5] The Spangenberg Group, American Bar Association Bar Information Program, State and County Expenditures for Indigent Defense Services in Fiscal Year 2002, at 35 (2003), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/indigentdefexpend2003.pdf.

limiting the number of plea bargains that are reopened and sent to trial.

The collateral consequences rule is also necessary to prevent the right to counsel from becoming completely detached from the text and history of the Sixth Amendment. As this Court has previously recognized, and scholars of all stripes agree, the Framers understood the Sixth Amendment to guarantee only the right to *employ* counsel in criminal cases, not the right to receive state-paid counsel. While this Court departed from that understanding in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963)—and we do not quarrel with that decision—this historical background counsels restraint when faced with an invitation to dramatically expand the right to state-paid counsel beyond its present bounds.

But that is exactly what Padilla's arguments would do. Besides attacking the collateral consequences rule altogether, he argues for two exceptions that would effectively swallow the rule: a "deportation" exception, and a "misadvice" exception. Neither one makes sense.

As to the first: Deportation is a *federal* civil proceeding that must be initiated by the Department of Homeland Security in a special federal Immigration Court. It is subject to its own multi-layer review process, and is completely outside of the control of a state court presiding over a criminal prosecution. The collateral consequences rule clearly and correctly excludes such proceedings from the scope of the Sixth Amendment right to criminal trial counsel. And, given the large number of aliens who are charged with crimes, an "exception" for deportation issues

would substantially burden the plea agreement system, and dramatically increase its cost.

Adopting an exception based on "misadvice" would be equally if not more unwise. As Kentucky has explained, the distinction between misadvice and "non-advice" is often elusive in theory. And, as a practical matter, recognition of a "misadvice" exception would effectively open *every* guilty plea to an expensive, time-consuming collateral attack. Indeed, such an exception would give criminal defendants a powerful incentive to fabricate allegations about legal advice they were given by their court-appointed lawyers—allegations that would often be difficult to disprove months or years after the fact. It would also create incentives for unscrupulous appointed counsel to *deliberately* misadvise their clients on some collateral issue, thereby creating a latent "misadvice" claim that the client could invoke if she later had misgivings about her plea.

Perhaps most important, constitutionalizing advice on collateral consequences would effectively preempt the states' ongoing efforts to address the effect of deportation on criminal defendants. As another *amicus* has pointed out, twenty-eight states and the District of Columbia have *already* adopted rules, plea forms, or statutes requiring courts to advise criminal defendants of the possible immigration consequences of their pleas. Br. of the Nat'l Assn. of Crim. Defense Lawyers et al., *Amici Curiae,* App. 11a; *see also INS* v. *St. Cyr*, 533 U.S. 289, 323 n.48 (2001) (citing laws in eighteen states and the District of Columbia). There simply is no need for this Court to displace the States' efforts, or future efforts by Congress, to address this policy problem in the manner they think best.

I. The Collateral Consequence Rule Serves Important Governmental Interests And Is Fully Consistent With the Text and History of the Sixth Amendment, as Well As this Court's Precedents

A. The Rule Protects the Strong State Interest in the Finality of Plea Agreements, Which are the Backbone of the U.S. Criminal Justice System

Thirty years ago in *Timmreck*, this Court recognized that "new grounds for setting aside guilty pleas" have a disproportionate impact on the "orderly administration of justice" because "the vast majority of criminal convictions result from such pleas." 441 U.S. at 784. If anything, that observation is even more true now than it was then: In 2004, 95% of all state felony convictions—and 96% of state felony drug convictions—were entered via plea agreements.[6] The proportions are similar in federal courts.[7] These numbers make clear that the state's interest in the finality of plea agreements is at least as strong today as it was thirty years ago.

Because plea agreements are so essential in the U.S. justice system, ensuring their finality is likewise essential. As Kentucky has shown (at 19-20), the col-

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[6] Bureau of Justice Statistics, U.S. Dept. of Justice, Criminal Sentencing Statistics, http://www.ojp.usdoj.gov/bjs/sent.htm (last visited Aug. 11, 2009).

[7] Federal courts appear to rely on plea agreements at least as much as state courts. Of the 89,069 criminal defendants in the U.S. District Courts between June 2007 and June 2008, just 3124 were tried by a jury or a judge. Nearly 78,000—or 96%—pleaded guilty.

lateral consequences rule protects the state's strong interest in finality by preventing felons who pleaded guilty to their crimes from overturning their conviction on grounds unrelated to their guilt or the integrity of the criminal proceedings against them. *See Timmreck*, 441 U.S. at 784.

The collateral consequences rule likewise prevents the States from being held responsible for proceedings—and related legal advice—that are effectively beyond their control. Indeed, the First Circuit has defined "collateral" in just such functional terms: A consequence is deemed "collateral" if it is "controlled by an agency which operates beyond the direct authority of the trial judge" or otherwise "remains beyond the control and responsibility of the district court in which [the] conviction was entered." *United States* v. *Gonzalez*, 202 F.3d 20, 27 (1st Cir. 2000). The collateral consequences rule thus protects the state's interest in finality by protecting guilty pleas from being attacked by defendants who have discovered too late the broad array of social and legal consequences that follow from a felony conviction.[8]

That protection is essential. Given the overwhelming number of State criminal convictions entered as a result of guilty pleas each year—over 1.2 million in 2004 alone[9]—even an incremental weakening in the finality of these pleas may have a dramatic

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[8] *See, e.g.*, U.S. DEP'T OF JUSTICE, FEDERAL STATUTES IMPOSING COLLATERAL CONSEQUENCES UPON CONVICTION, http://www.usdoj.gov/pardon/collateral_consequences.pdf (last accessed August 5, 2009).

[9] Bureau of Justice Statistics, U.S. Dept. of Justice, Criminal Sentencing Statistics, http://www.ojp.usdoj.gov/bjs/sent.htm (last visited Aug. 11, 2009).

effect on the integrity and effectiveness of the U.S. system of justice. *See Timmreck*, 441 U.S. at 784. That alone is a powerful reason to embrace the collateral consequences rule, and to reject Padilla's efforts to abolish or weaken it.

B. The Rule Protects States From The Potentially Enormous Costs Of Expanding The Right To State-Paid Counsel To Include Competent Advice On Collateral Matters Outside The States' Responsibility And Control.

Another powerful reason for the collateral consequences rule is protecting both the States' fiscs, and their judicial and prosecutorial resources.

The direct costs of providing counsel to indigent defendants are already enormous, and have risen substantially in the last 20 years. In 1986, the cost of indigent defense in the 50 states and the District of Columbia was just under $1 billion; by 2002, the cost had risen to over $2.8 billion.[10] Obviously, the more subjects on which the State must provide indigent defendants with competent legal advice, the greater those costs will be. Merely giving non-citizen defendants access to an immigration-law expert would substantially increase the States' costs of providing counsel to those they prosecute. And those costs could become truly exorbitant if the States were also required to provide sound legal advice on other poten-

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[10] The Spangenberg Group, American Bar Association Bar Information Program, State and County Expenditures for Indigent Defense Services in Fiscal Year 2002, at 35 (2003), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/indigentdefexpend2003.pdf.

tial collateral consequences of a plea agreement—such as its effects on divorce or child-custody proceedings; on landlord-tenant matters; on certain types of employment; or on the availability of public housing or other public services. Each of these areas is a distinct legal specialty. And without the collateral consequences rule, one can well envision a regime in which a State would be required to provide a "dream team" of five or more lawyers for each indigent defendant. The aggregate costs would be astronomical.

The addition of such costs, moreover, would go well beyond the rationale for requiring State-paid counsel. The logic of requiring states to pay for criminal defense counsel rests on the assumption that the states have a responsibility to ensure the basic fairness of the criminal prosecutions brought under their authority. States, as this Court has noted, "quite properly spend vast sums of money to establish machinery to try defendants accused of crime," and "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963).[11] The collateral consequences rule keeps

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[11] This limited role is consistent with the rationale advanced by the Progressive thinkers who founded the first Public Defender's Office in Los Angeles in 1913. Against the more combative model endorsed by some, they envisioned the public defender as "an officer of the court protecting the innocent and pleading the guilty . . . even when he went to trial, . . . present[ing] the evidence in a balanced and fair way—his interest not solely that of the client, but of truth and justice, which entitled him to the same respect accorded to the prosecutor." Babcock, Barbara Allen, *Inventing the Public Defender*, 43 AM. CRIM. L. REV. 1267, 1275 (2006).

this limited constitutional right to state-paid counsel—designed to protect the right to a fair trial in a criminal prosecution—from evolving into a broad-ranging right to state-paid counsel to advise an indigent defendant on any number of non-criminal matters.

As noted, the fiscal consequences of allowing criminal defendants to re-open their plea agreements based on defective advice on collateral matters are potentially huge. Plea agreements are "an essential component of the administration of justice" partly because "[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." *Santobello* v. *New York*, 404 U.S. 257, 260 (1971). For example, one investigation in the mid-1990s found that in Washington State, normal felonies resolved by a plea bargain cost about $600 to defend," while "defense in a full-blown criminal trial could cost as much as $50,000 per case."[12]

If the States were required to provide sound legal advice on the full range of potential collateral consequences, the costs associated with plea bargains would certainly double or triple in size. And that, of course, would reduce the State's incentive to resolve cases through plea bargains, and would thereby put

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[12] Nkechi Taifa, *Symposium, Violent Crime Control and Law Enforcement Act of 1994: "Three-Strikes-and-You're-Out" Mandatory Life Imprisonment for Third Time Felons*, 20 DAYTON L. REV. 717, 722 (1994); *see also* Tina M. Olson, *Strike One, Ready for More? The Consequences of Plea Bargaining "First Strike" Offenders under California's "Three Strikes" Law*, 36 CAL. W. L. REV. 545, 562 n.159 (2000).

even greater strain on judicial resources at both the state and federal levels.

C. The Sixth Amendment's Text And History Militate Against Any Further Extension Of The Right To State-Paid Counsel.

The Sixth Amendment's text and history also counsel strongly against any extension of the right to State-appointed counsel to include advice regarding collateral consequences. As this Court recognized in *Scott* v. *Illinois*, "[t]here is considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense." 440 U.S. 367, 370 (1979). Indeed, there appears to be *no* serious dispute among legal scholars and historians that the Amendment, as originally enacted, provided nothing more than a right of an accused to the assistance of his or her own, personally funded counsel, and in no way mandated that counsel be provided by the government, be it federal or State.[13]

Amici recognize that, as to the States, the Court departed from this understanding more than 50 years ago when it held, in *Gideon* v. *Wainwright*, 372 U.S.

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[13] See, *e.g.*, Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 114 (1998) ("[T]he Sixth Amendment gave the accused some freedom, some autonomy, in controlling the shape of 'his defence' [including] . . . whom (if anyone) to hire as a lawyer."); Anthony Lewis, *Gideon's Trumpet* 110 (Vintage Books 1989) (1964) ("Historically speaking, the amendment was almost certainly not envisaged by its framers as reaching the problem of the man too poor to hire a lawyer for his defense.").

335 (1963), that the Sixth and Fourteenth Amendments provide indigent defendants a right to State-provided counsel in State felony proceedings. *Id.* at 344-45.[14] *Amici* have no quarrel with that settled precedent. Nevertheless, in deciding whether to overturn or weaken the collateral consequences rule, and thereby *expand* the right to State-paid counsel, the Court may wish to be mindful of the pertinent textual and historical evidence on the original understand of the Sixth Amendment's right to counsel. That evidence includes (a) the English common law as it existed just before the adoption of the Sixth Amendment; (b) the Framers' decision not to follow State laws that expressly provided a right to appointed counsel in certain circumstances; and (c) the interpretation of the Amendment's right-to-counsel provision by the first Congress. These materials establish that at its adoption the Sixth Amendment was not viewed as granting *any* right to government-provided representation. And that fact strongly sug-

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[14] The shift had already begun in *Powell* v. *Alabama*, 287 U.S. 45 (1932), which held that in some federal cases, which the Court said would be determined on a case-by-case basis, "the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel." *Id.* at 72. Six years later, the Court interpreted the Sixth Amendment to require the appointment of counsel in *all* federal cases where a defendant's "life or liberty is at stake." *Johnson* v. *Zerbst*, 304 U.S. 458, 468 (1938). However, for the next 25 years, the Court refused to incorporate this interpretation of the Sixth Amendment against the States. Instead, it adhered to its earlier holding in *Betts* v. *Brady*, 316 U.S. 455, 461-62 (1942), that "[t]he Sixth Amendment of the national Constitution applies only to trials in federal courts," and that due process required appointed counsel in State cases only where necessary to avoid "a denial of fundamental fairness, shocking to the universal sense of justice." But *Betts* was overruled by *Gideon*.

gests that the right to State-paid counsel, recognized in *Gideon* and its progeny, should not be expanded beyond its present bounds.

1. The Sixth Amendment's right-to-counsel provision was a response to the traditional English common-law rule, which severely limited the assistance of counsel in serious criminal cases. Under that rule, "a person charged with treason or felony was denied the aid of counsel, except in respect of legal questions which the accused himself might suggest." *Powell*, 287 U.S. at 60; see William M. Beaney, *The Right to Counsel in American Courts* 8-10 (Greenwood 1972) (1955). By contrast, "parties in civil cases and persons accused of misdemeanors were entitled to the full assistance of counsel." *Powell*, 287 U.S. at 60. Thus, as this Court has recognized, the English rule "perversely gave less in the way of right to counsel to accused felons than to those accused of misdemeanors." *Scott*, 440 U.S. at 372; *Powell*, 287 U.S. at 60 (noting that the English rule was "outrageous" in that it gave "the right to the aid of counsel in petty offenses" but not "in the case of crimes of the gravest character, where such aid is most needed").[15]

Because of the absurdity of the English rule, many Colonies abandoned it before the Sixth Amendment was even drafted. See *Betts*, 316 U.S. at

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[15] Contemporaneous commentators also challenged the English rule. Blackstone inquired: "Upon what face of reason can that assistance be denied to save the life of a man, which is yet allowed him in prosecutions for every petty trespass?" 4 William Blackstone, *Commentaries on the Laws of England* 355 (12th ed. 1795), *quoted in* Beaney, *supra*, at 11. And Zephaniah Swift referred to the English rule as a "cruel and illiberal principle." 2 *A System of Laws of the State of Connecticut* 398-99 (1795-96).

465 (noting that that Delaware, Maryland, Massachusetts, New Hampshire, New Jersey, New York, and Pennsylvania had abandoned the English Rule before the Sixth Amendment was adopted). As this Court has explained, in "light of th[e] common law practice, it is evident that the[se] constitutional provisions . . . were intended to do away with" that rule. *Id.* at 466. Or, as one commentator put it, the intent of the Framers "was clearly to abrogate this perverse English common law rule by constitutional amendment and to provide the defendant with the right to be represented by counsel, presumably of his own choice and at his own expense." B. Mitchell Simpson, III, *A Fair Trial: Are Indigents Charged With Misdemeanors Entitled To Court Appointed Counsel?*, 5 Roger Williams U. L. Rev. 417, 425-26 (2000).

2. While making a decisive break with the English rule, the Sixth Amendment did not adopt the more expansive right to appointed counsel already recognized by some States. In fact, a comparison of the Sixth Amendment's language with that of contemporaneous State statutes mandating appointed counsel reveals that the Sixth Amendment's drafters deliberately avoided creating any right to appointed counsel.

When the Sixth Amendment was drafted, apparently only Connecticut and New Jersey appointed counsel for defendants facing felony indictments generally. See *Betts*, 316 U.S. at 467 n.20. Another five States provided counsel for defendants only in capital cases. See *Betts*, 316 U.S. at 467 n.20 (Delaware, Pennsylvania, Massachusetts, and New Hampshire); Beaney, *supra*, at 17 (South Carolina). Like New Jersey, these States did so through explicit statutory

language providing for "assigned" counsel.[16] Moreover, these appointed counsel provisions supplemented more general statutory language providing the right to retain one's own counsel. See Beaney, *supra*, at 16-21.

The language of the Sixth Amendment, by contrast, made no mention of "assigned" or appointed counsel. This silence is particularly telling given that most of the founders were generally aware of the developments in State law at the time and that the federal Constitution was in many ways modeled after

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[16] *See, e.g.*, 3 Statutes at Large of Pa. 199 (Busch 1896), *quoted in* Beaney, *supra*, at 16 ("[U]pon all trials of said capital crimes, lawful challenges shall be allowed, and learned counsel assigned to the prisoners."); Act of Aug. 20, 1731, 43 Laws of the Province of S.C. 518-19 (Trott 1736), *quoted in* Beaney, *supra*, at 17 (stating that if a capital defendant "shall desire coun[sel], the court . . . is hereby authorized and required, immediately, upon his or their request, to assign . . . such and so many council not exceeding two, as the person or persons shall desire") (omissions in Beaney); 1791 N.H. Laws 247 (Melcher 1792), *quoted in* Beaney, *supra*, at 21 (stating that a capital defendant "shall at his request have counsel learned in the law assigned him by the court"); 2 Laws of the Commonwealth of Massachusetts from November 28, 1780 to February 28, 1807, ch. 71 app. at 1049 (providing for assigned counsel for defendants accused and indicted for treason: "And in caſe any perſon or perſons, ſo accuſed and indicted, ſhall deſire council, the Court before whom ſuch perſon or perſons, ſhall be tried, or ſome Judge of that Court, ſhall, and is hereby authorized and required, immediately upon his or their requeſt, to aſſign to ſuch perſon or perſons, ſuch and ſo many council, not exceeding two, as the perſons ſhall deſire, to whom ſuch counsil ſhall have free acceſs at all ſeaſonable hours."); Act of 1719, ch. 22, § 4, 1 Del. Laws 64, 66 (S. Adams & J. Adams, 1797) (requiring counsel in capital cases: "And that upon all trials of the ſaid capital crimes, lawful challenges ſhall be allowed, and learned council aſſigned to the priſoners.").

contemporaneous State constitutions.[17] Accordingly, the Sixth Amendment's silence on the right to appointed counsel reveals that—unlike the State laws that explicitly required appointed counsel—the Amendment was not designed to impose such a requirement.

3. Actions of the first Congress support the conclusion that the Sixth Amendment did not require appointed counsel. For example, the Judiciary Act of 1789, signed the day before the Sixth Amendment was proposed in Congress, contained the following provision: "[I]n all the courts of the United States, the parties may plead and manage their own causes personally *or* by the assistance of such counsel or attorneys at law as by the rules of the said courts . . . shall be permitted to manage and conduct causes therein." Ch. 20, § 35, 1 Stat. 73, 92 (1789) (emphasis added). Unlike the State statutes providing for appointed counsel in some circumstances, the Judiciary Act made no mention of that subject. And as Prof. Beaney has noted, "If Congress had thought that the proposed Sixth Amendment counsel provision embodied a startling change from this statutory rule, some discussion concerning the proposal would undoubtedly have occurred on the floor." Beaney, *supra*, at 28.

Even more telling is a 1790 statute requiring that anyone indicted for treason or other capital crimes be offered "assigned counsel":

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[17] See Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and its Influences on American Constitutionalism*, 62 Temp. L. Rev. 541-43 (1989) (noting that the delegates "had wide experience" with the contemporary state constitutional debates).

> I. [Such a defendant] shall also be allowed and admitted to make his full defense by counsel learned in the law; and the court before whom such person shall be tried . . . shall, and they *are hereby authorized and required immediately upon his request to assign to such person such counsel*, not exceeding two, as such person shall desire, to whom such counsel shall have free access at all seasonable hours . . . .

Act of Apr. 30, 1790, ch. 9, § 29, 1 Stat. 112, 118 (emphasis added).

The enactment of this statute contemporaneously with the Sixth Amendment clearly indicates that Congress did not believe the Sixth Amendment itself required "assigned" counsel in such cases. For if the Sixth Amendment itself provided such a right, the right provided in the statute would have been both redundant and woefully under-inclusive. As this Court has repeatedly held, "[a]n Act 'passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty evidence of its true meaning.'" *Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983) (omission in original) (quoting *Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265, 297 (1888)); see *Franklin* v. *Massachusetts*, 505 U.S. 788, 803-04 (1992) ("[I]nterpretations of the Constitution by the First Congress are persuasive."); *Bowsher* v. *Synar*, 478 U.S. 714, 723-24 & n.3 (1986) (listing 20 members of the first Congress who had been delegates to the Philadelphia Convention).[18]

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[18] This Court adopted a similar interpretation some 100 years later when it had what appears to have been its first opportu-

Like the other historical evidence, the actions of the first Congress cast substantial doubt on the propriety of further expanding the federal right to appointed counsel to include advice on the collateral consequences of conviction.

II. Padilla's Proposed "Deportation" Exception Makes No Sense As A Matter Of Law Or Policy.

Apparently mindful of the importance of the collateral consequences rule, Padilla attempts to craft a narrow "deportation" exception to that rule. However, as Kentucky shows in its brief, deportation is unquestionably a collateral consequence of a criminal proceeding. Resp. Br. at 36-41. And as the Ninth Circuit has noted, "[a]ll other circuits to address the question have concluded that deportation is a collateral consequence of the criminal process and hence the failure to advise does not amount to ineffective assistance of counsel." *United States* v. *Fry*, 322 F.3d 1198, 1200 (9th Cir. 2003). That conclusion is correct: Deportation is a civil proceeding initiated in

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nity to address expressly the scope of the Sixth Amendment's right to counsel. In *United States* v. *Van Duzee*, 140 U.S. 169, 173 (1891), the Court addressed a claim by several federal court clerks for reimbursement for the cost of providing copies of indictments to criminal defendants. This required the Court to determine whether such copies were required by the Sixth Amendment. The Court held they were not. Under the Sixth Amendment, the Court held, "[t]here is . . . no general obligation on the part of the government either to furnish copies of indictments, summon witnesses or retain counsel for defendants or prisoners." *Id.* The Court reasoned that "[t]he object of the constitutional provision was merely to secure those rights which by the ancient rules of the common law had been denied to [criminal defendants]; but it was not contemplated that this should be done at the expense of the government." *Id.*

federal administrative courts and subject to its own extensive review process. The states, moreover, are already addressing the policy concerns surrounding the deportation of convicted criminals, and this Court should not prematurely pre-empt this process by constitutionalizing immigration advice to criminal defendants.

A. The Collateral Consequences Rule Clearly And Correctly Excludes State-Paid Counsel's Advice Regarding Civil Deportation Proceedings Carried Out in Special Administrative Courts Under the Authority of a Different Sovereign.

As Kentucky correctly points out (at 37), deportation is a collateral matter both because it does not stem directly from the conviction and because the sentencing court has no power over deportation decisions. Indeed, as the First Circuit has held, "what renders the plea's immigration effects collateral . . . [is] the fact that deportation is not the sentence of the court which accepts the plea but of another agency over which the trial judge has no control . . . ."[19] *Gonzalez*, 202 F.3d at 27 (quotations omitted).

In fact, deportation is the result of a civil proceeding carried out in federal administrative courts and subject to its own extensive review process, up to and

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[19] Because the distinction between collateral and direct consequences of a criminal conviction turns largely on whether the consequence is under the sentencing court's "control," *Gonzalez*, 202 F.3d at 27, it is particularly odd for Padilla to argue, as he does at p. 51 of his merits brief, that restrictions on the *U.S. Attorney General's* ability to cancel post-conviction deportation somehow transfers responsibility for deportation proceedings from the executive branch to the state or federal court presiding over the prior criminal prosecution.

including review in this Court. *See, e.g., Nijhawan* v. *Holder*, 129 S. Ct. 2294, 2298 (2009). To deport a criminal immigrant, the Department of Homeland Security first files a Notice to Appear in Immigration Court, an administrative court under authority of the Executive Office for Immigration Review.[20] In these proceedings, criminal immigrants can and do raise claims under the Convention Against Torture in Immigration Court, and are allowed to present evidence that they have a credible fear of torture if they return to their home country and should not be removed from the U.S. *See, e.g., Kolkevich* v. *AG of the United States*, 501 F.3d 323, 325-26 (3d Cir. 2007).

Once the Immigration Judge rules on the immigrant's removal, both the DHS and the immigrant may appeal the Immigration Judge's decision to the Board of Immigration Appeals. Immigration Court Practice Manual at 101.

After the BIA issues its ruling, there follows another layer of review, this time in a federal Court of Appeals. *Kolkevich*, 501 F.3d at 326.

Finally, when a removal proceeding presents important unresolved legal questions, this Court may grant a writ of certiorari and review. *See, e.g., Nijhawan* v. *Holder*, 129 S. Ct. 2294, 2298 (2009).

This whole process, which is subject to its own layers of review and appeal, unquestionably qualifies as a "collateral consequence" of the immigrant defen-

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[20] Office of the Chief Immigration Judge, Immigration Court Practice Manual 55 (2008), *available at* http://www.usdoj.gov/eoir/vll/OCIJPracManual/Chap%204.pdf [hereinafter "Immigration Court Practice Manual"].

dant's criminal conviction. Of that there can be no doubt.

The practical consequences of Padilla's proposed "deportation exception," moreover, are staggering. Available statistics indicate that there are currently 22 million non-citizens residing in the United States; of those nearly 1000,000 are in custody—suggesting that substantial numbers are charged with crimes every year.[21] Given those numbers, an exception to the collateral consequences rule for immigration issues alone would dramatically expand the costs of the criminal justice system in many States. And such an exception would undermine the finality of a substantial percentage of State plea agreements. Padilla's "deportation exception," therefore, would come close to swallowing the collateral exception rule—and would certainly and substantially weaken the protections it provides to the States' treasuries, and to their prosecutorial and judicial resources.

B. In A Variety Of Ways, Most States Are Already Addressing The Collateral Effects Of Plea Agreements On Immigration Issues, And It Would Be Unwise To Interfere With The States' Experimentation In This Area.

A "deportation exception" would also inappropriately "take the development of rules and procedures in this area out of the hands of legislatures and state

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[21] Bureau of Justice Statistics, U.S. Department of Justice, Office of Justice Programs, Bulletin, Prison Inmates at Midyear 2007, June 2008, NCJ 221944, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pim07.pdf ; American Community Survey, Selected Social Characteristics in the United States: 2007, *available at* *http://www.census.gov/acs/www/Products/index.html.*

courts shaping policy in a focused manner and turn it over to federal courts . . . ." *DA's Office* v. *Osborne*, 129 S. Ct. 2308, 2312 (2009). It is far more desirable—as a matter of well as Sixth Amendment jurisprudence—to let the states develop their own rules and policies in this area.

The States, moreover, are *already* grappling with this difficult and sensitive issue. As *amici* National Association of Criminal Defense Lawyers et al. have shown, 28 states and the District of Columbia have *already* adopted rules, plea forms, or statutes requiring courts to advise criminal defendants of the possible immigration consequences of their pleas. Br. of the Nat'l Assn. of Crim. Defense Lawyers et al., *Amici Curiae*, App. 11a [hereinafter NACDL Brief]; *see also St. Cyr*, 533 U.S. at 323 n.48 (citing laws in eighteen states and the District of Columbia). Some states, like Texas, require the court to inform the defendant that his plea may result in deportation. Tex. Code Crim. Proc. art. 26.13. Washington requires a specific warning and allows an unwarned defendant who is at risk of deportation to withdraw his plea. Rev. Code Wash. (ARCW) § 10.40.200. California requires the court to give the defendant both a warning, and, upon request, additional time to consider the possible immigration consequences of his plea. Cal Pen Code § 1016.5. Other states take different approaches. And Kentucky itself has recently revised its plea forms to include a warning to non-citizens that they "may be subject to deportation pursuant to the laws and regulations governing the United States Immigration and Naturalization Service." Ky. Form AOC-491, Rev. 2-03; Ky. Form AOC-491.2, Rev. 1-03.

This kind of experimentation among the States currently occurs at the judicial level as well. One re-

cent survey of state judges found that sixty percent of them discuss collateral consequences with defendants at sentencing. Alec C. Ewald et al., *Collateral Consequences of Criminal Convictions in American Courts: The View from the State Bench*, 29 JUSTICE SYSTEM JOURNAL 145 (2008).

Given the variety of ways that states and judges are already addressing these issues, "[t]here is no reason to constitutionalize" advice of counsel on the immigration consequences of a guilty plea *Osborne*, 129 S. Ct. at 2312.

III. Padilla's Proposed "Misadvice" Exception Is Equally Misguided.

Nor is there any basis for Padilla's attempt to create a special exception for "misadvice." As Kentucky has shown (at 31-35), the decisions making exceptions to the collateral consequences rule for "misadvice" have failed to grapple with the text and history of the limited Sixth Amendment guarantee of counsel. Moreover, constitutionalizing misadvice on collateral consequences would not achieve the policy results Padilla seeks. To the contrary, a rule penalizing misadvice but not nonadvice would reward defense attorneys for *refusing* to answer their clients' questions about collateral matters—a perverse result in light of the ethical standards that encourage open discussion of collateral consequences.[22]

Even worse, as a practical matter, recognition of a "misadvice" exception would effectively open every

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[22] *See, e.g.*, National Legal Aid and Defender Association's Performance Guidelines for Criminal Defense Representation § 6.2(a)(3), 6.3(a), 8.2(b)(8), & 8.2(c)(3) (1997), *available at* http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines.

guilty plea up to a time-consuming and expensive collateral attack. Such an exception would give criminal defendants a powerful incentive to fabricate allegations about legal advice they were given by their court-appointed lawyers—allegations that would be difficult after the fact. And such an exception would make it possible for unscrupulous appointed counsel to give their clients a later opportunity to reopen their plea agreements: All such counsel would need to do is to deliberately misadvise a client on some collateral issue, knowing that she could later invoke that misadvice if she had misgivings about her plea.

In short, a "misadvice" exception to the collateral consequences rule makes no sense as a matter of theory or practice.

IV. Abandoning Or Weakening The Collateral Consequences Rule Will Distort This Court's Sixth Amendment Jurisprudence Without Truly Benefiting Immigrants

Ultimately, the lengthy and uncertain process of petitioning to set aside a plea agreement is a poor substitute for the only remedy that would give Padilla and similarly situated immigrants meaningful relief: legislative change. As past NDAA president Robert M.A. Johnson said in 2001, "[a]t times, the collateral consequences of a conviction are so severe that we are unable to deliver a proportionate penalty in the criminal justice system without disproportionate collateral consequences."[23] Moreover,

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[23] Robert M.A. Johnson, *Message from the President: Collateral Consequences*, THE PROSECUTOR, May 2001, *available at* http://www.ndaa.org/ndaa/about/president_message_may_june_2001.html.

"[t]he efforts of prosecutors and judges do not fully deal with the problem" because they "lack [] the ability . . . to control the whole range of [collateral] restrictions and punishment imposed on an offender." Johnson thus concluded that ultimately, "[t]here must be some reasonable relief mechanism" in the laws that *impose* the collateral consequences.

Padilla's own case makes this point eloquently. He claims that but for the misadvice he allegedly received from his counsel, he would have gone to trial. Pet. Br. at 11. But his likelihood of success at trial was minuscule: Court records show that, in the year Padilla was arrested, only one defendant charged with a drug-related offense was acquitted by a jury.[24] What is more, the evidence against Padilla—which included over 1,000 pounds of marijuana in his truck and his admission that he knew that he was smuggling drugs—was overwhelming. R. 33-34. Thus, although Padilla asserts that going to trial and requesting jury sentencing *may* have resulted in earlier parole eligibility, Pet. Br. at 10, the reality is that anything less than a full acquittal would still have left him in exactly the same position he finds himself in today: an immigrant whose criminal conviction makes him deportable. Even the best pre-plea immigration advice would not have saved him from that fate. And that, of course, is why he cannot establish genuine prejudice from the misadvice he allegedly received.

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[24] Administrative Office of the Courts, Kentucky Court of Justice, Hardin County Drug Offenses Disposed by Trial Type, Offense, Final Plea & Disposition (Aug. 10, 2009) (on file with author).

By contrast, the results Padilla urges here—excluding deportation from the collateral consequences rule or abandoning it altogether—would permanently distort the Sixth Amendment's limited guarantee of effective assistance of counsel "in all criminal prosecutions." It would also fail to truly address the harsh consequences of U.S. immigration laws for immigrant criminals. As the Seventh Circuit has put it, although "it is highly desirable that both state and federal counsel develop the practice of advising defendants of the collateral consequences of pleading guilty," in the end, "what is desirable is not the issue before us." *Santos* v. *Kolb*, 880 F.2d 941, 945 (7th Cir. 1989), *superseded by statute*, Pub. L. No. 101-649, Title V, 505(b), 104 Stat. 5050, *as recognized in Rodriguez* v. *United States*, No. 92-3163, 1995 U.S. App. LEXIS 7920, at *3 (7th Cir. Apr. 6, 1995). Ultimately, "[t]he failure of petitioner's counsel to inform him of the immigration consequences of his guilty plea, however unfortunate it might be, simply does not deprive petitioner of the effective assistance of counsel guaranteed by the Constitution." *Id.*

CONCLUSION

In sum, providing accurate counsel to a criminal defendant about the immigration-law consequences of a guilty plea is certainly good practice for a State-paid attorney, and may well be required by the attorney's ethical obligations. But that does not mean that the *State* is required by the Sixth Amendment to ensure that such counsel is provided—on pain of losing the finality of a duly entered guilty plea. A contrary ruling would effectively destroy the collateral consequences rule and, in so doing, wreak havoc on the plea bargaining regime that is the backbone of the U.S. criminal justice system.

For all these reasons, the Court should affirm the decision of the Supreme Court of Kentucky.

Respectfully submitted.

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JOSE PADILLA,
Petitioner,
v.
COMMONWEALTH OF KENTUCKY,
Respondent.

On Writ of Certiorari to the Supreme Court of Kentucky

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL LEGAL AID & DEFENDER ASSOCIATION, KENTUCKY ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, COLORADO CRIMINAL DEFENSE BAR, IMMIGRATION IMPACT UNIT OF THE MASSACHUSETTS COMMITTEE FOR PUBLIC COUNSEL SERVICES, NEW MEXICO CRIMINAL DEFENSE LAWYERS ASSOCIATION, NEW YORK STATE DEFENDERS ASSOCIATION, OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION, WASHINGTON DEFENDER ASSOCIATION, LEGAL AID SOCIETY OF THE CITY OF NEW YORK, NEIGHBORHOOD DEFENDER SERVICE OF HARLEM, DEFENDER ASSOCIATION OF PHILADELPHIA, FLORENCE IMMIGRANT AND REFUGEE RIGHTS PROJECT, IMMIGRANT DEFENSE PROJECT, IMMIGRANT LEGAL RESOURCE CENTER, AND NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are associations of public and private criminal defense lawyers who have represented or counseled thousands of immigrants accused of crimes over the years. *Amici* also include immigration advocacy and service organizations from around the country who have special expertise concerning the immigration consequences of criminal convictions and who provide resources to the criminal defense bar. *Amici* and their member practitioners confront on a daily basis the unique circumstances faced by non-citizen criminal defendants and are well aware of the harsh impact that immigration status can have, both in terms of penal and immigration law consequences. *Amici* have also worked through the years to develop proper standards of conduct for defense counsel in this area and are well aware of the real-world implications of these standards for defense attorneys who must abide by them on the front lines every day.

Many of the *amici* to this brief were signatories to the *amicus* brief filed by the National Association of Criminal Defense Lawyers and others in *INS v. St. Cyr*, 533 U.S. 289 (2001). *See* Brief of *Amici Curiae* National Association of Criminal Defense Lawyers et al. in No. 00-767 [hereinafter *St. Cyr Amicus*]. The *St. Cyr* majority specifically relied on that brief in recognizing that, given the importance of

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[1] Letters of consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored any part of the brief, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

immigration consequences to non-citizen defendants, "competent defense counsel" would advise a non-citizen defendant about those consequences. 533 U.S. at 323 n.50. We are concerned that the Court not retreat from such an understanding today.[2]

SUMMARY OF ARGUMENT

The criminal defense function includes advising the client of every important consequence of a plea. This is important for all criminal defendants but it is especially so for non-U.S. citizens. Competent defense attorneys know that when it comes to non-citizen defendants, the distinction between direct and so-called "collateral" consequences is illusory. Immigration status will affect a defendant's prospects at every stage of the criminal process, from the likelihood of obtaining bail to the outcome of plea bargaining and sentencing to the conditions of post-conviction confinement. Most importantly, the non-citizen faces the harsh consequence of deportation — the potential "loss of both property and life, or of all that makes life worth living," *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) — with a single ill-considered plea. A defense attorney who negotiates a plea resulting in the defendant's effective exile, without so much as investigating that possibility or asking whether it matters to the defendant, has not fulfilled that attorney's duty to the bar, to the Constitution, or, most of all, to the client.

Although not all criminal defense attorneys comply with their obligations in this area — as

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[2] Separate statements of interest for each of the *amici* organizations are included in Appendix A.

Petitioner's unfortunate situation shows — this duty is recognized in standards established by the nation's leading criminal defense organizations, many of whom are *amici* here. *E.g.,* National Legal Aid & Defender Association, *Performance Guidelines for Criminal Defense Representation* 6.2 and commentary (1995) [hereinafter *NLADA Guideline*]. These guidelines are not a one-size-fits-all standard but merely reflect the fundamentally client-centered principle at the heart of all competent representation, namely that defense attorneys must recognize and investigate those issues that are important to their clients. In the case of plea bargains, that means investigating the most important consequences of a plea for each particular client — including the harsh potential consequence of deportation — before that plea is entered. This principle is recognized by defense attorneys throughout the nation, including the leading organization for criminal defenders in Kentucky, which is a signatory to this brief.

Finally, there is little risk that a decision for Petitioner will impose an undue burden on defense counsel. *Amici* are as sensitive as anyone to the need to ensure that defense counsel's obligations not unreasonably exceed their capacities and resources. Yet any burden of advising about immigration consequences is greatly mitigated by the considerable resources available to defense counsel. These resources (many of which are available for free on the internet) include written treatises and practice guides; trainings, consultations, and other expert resources provided by immigrant advocacy

and service organizations; and, in a growing number of public defender organizations, in-house expertise. Investigating these issues is not effortless, but it is more than within reach for competent defense counsel.

ARGUMENT

A criminal defendant's immigration status affects every stage of the criminal process, from pre-trial proceedings through post-conviction confinement. The non-citizen also faces the potential consequence of deportation — permanent exile from perhaps the only country he has ever really known — with a single ill-advised plea. These twin sets of consequences give rise to the defense attorney obligations at issue here. We begin by summarizing the many ways in which immigration and penal consequences alike arise from a defendant's non-citizen status. *Infra* Part I. We then set forth the basic standards that require criminal defenders to take their client's immigration status into account — guidelines that arise from the fundamentally client-centered approach that is at the core of all forms of representation. *Infra* Part II. Finally, we discuss the many resources available to criminal defenders throughout the nation who seek to comply with this obligation. *Infra* Part III.

I. A Criminal Defendant's Non-Citizen Status Affects Nearly Every Stage of the Penal Process.

The mandatory deportation that awaits many non-citizens as a result of their guilty pleas — including, potentially, the Petitioner in this case — is a harsh consequence of immigration status, but it is

not the only one. Competent defense lawyers know that when it comes to non-citizen defendants, the line between so-called "direct" and "collateral" consequences is an illusory one. In fact, a defendant's immigration status has an impact on nearly every phase of the criminal process:

Pre-Trial Release. A non-citizen will often spend more time in pre-trial detention prior to trial than other defendants. Immigration authorities may issue an immigration "hold" or "detainer" to notify criminal authorities of their interest in investigating whether a defendant is deportable and to request that any release from custody be delayed. 8 C.F.R. § 287.7. Such "detainers" often lead to unduly prolonged criminal custody both before and after trial. Even in the absence of a detainer, some courts consider a defendant's non-citizen status as a factor against pretrial release. *See* 1 Norton Tooby & Joseph Justin Rollin, *Criminal Defense of Immigrants* §§ 6.8-6.9 (4th ed. 2007) [hereinafter *Tooby & Rollin*]; *see also United States v. Motamedi*, 767 F.2d 1403, 1408 (9th Cir. 1985) ("factor of alienage . . . may be taken into account").

Plea Bargaining. Immigration status also plays a key role in plea bargaining — where 95 percent of cases are resolved. Of course, when defendants are improperly counseled, bad plea bargains can have devastating immigration consequences. But immigration status also affects the *penal* outcome of plea bargaining. Many non-citizens charged with deportable offenses will seek to avoid the risk of trial and negotiate a plea that enables them to remain in the country — even if they have strong defenses to

the charges. *See North Carolina v. Alford*, 400 U.S. 25, 33 (1970) ("reasons other than the fact that he is guilty may induce a defendant to so plead") (quotation marks omitted). Often, that means accepting greater penal consequences in return — such as by pleading to a harsher offense or one that carries other consequences (perhaps constituting a "strike" for purposes of three-strikes laws); pleading to additional counts of a different crime; or forgoing credit for time served. *See Tooby & Rollin* § 8.22. On occasion, a prosecutor may agree to reduce a charge or replace it with a lesser one to avoid triggering mandatory deportation. *See United States v. Gonzalez*, 58 F.3d 459, 462 (9th Cir. 1995) (given prosecutor's duty "to do justice," dismissal of deportable offense in exchange for sentencing enhancement was "proper and appropriate").

The harsh interplay of penal and immigration consequences that can befall a non-citizen who is improperly counseled at the plea bargaining stage is illustrated by the case of Bruce McDonald, a Jamaican national with an American wife and four children who has lived in the United States for over 30 years. *See* John Caher, *Tag Team of Lawyers Drawn to Alien's Plight*, N.Y. L.J., Apr. 11, 2005, at 1. Mr. McDonald, a cook at Cornell University, pleaded guilty in 1999 to felony drug charges after his attorney advised him that the plea would not result in deportation. *Id.* He was promptly served with a deportation order, but due to his counsel's misadvice — the same type of misadvice Petitioner received — succeeded in vacating the plea. At a

retrial, Mr. McDonald was acquitted of all felony charges. *Id.*

Sentencing. The sentencing phase, too, is affected by immigration status. Competent defense attorneys use every fact at their disposal to ensure the fairest possible sentence. Yet the improperly counseled non-citizen defendant loses that opportunity. For some, this can make the difference between a sentence that results in deportation and one that does not. *E.g.*, Cal. Rules of the Court, Rule 4.414(b)(6) (in deciding on probation, sentencing judges consider "adverse collateral consequences on the defendant's life"); *see also* N.Y. Crim. Proc. Law § 216.05(4)(b) (effective Oct. 7, 2009) (judge may consider "severe collateral consequences" in deciding whether to authorize substance abuse treatment in lieu of confinement). Even if deportation cannot be avoided, the fact that deportable immigrants will face far harsher conditions of confinement than similarly situated citizens, *infra* at 7-8, may influence the resulting sentence. *See United States v. Smith*, 27 F.3d 649, 650 (D.C. Cir. 1994) (downward departures permissible where defendant "faces . . . more severe prison conditions than he would otherwise" as "deportable alien"); *but cf. United States v. Restrepo*, 999 F.2d 640, 644 (2d Cir. 1993).

Conditions of Confinement. A non-citizen convicted of a deportable offense will likely spend more time in prison under more restrictive conditions than other defendants. Prisoners subject to immigration detainers are treated as higher security risks, and are prohibited from serving their sentences in minimum security facilities or

community treatment centers. *Tooby & Rollin* § 6.19. Non-citizens typically also find themselves ineligible for halfway houses, early release programs, out-patient drug rehabilitation programs, work release, literacy programs, or probation. *Id.* Once their sentence is completed — and sometimes even before — many non-citizens convicted of deportable crimes will go straight to immigration detention, awaiting deportation proceedings under often harsh conditions. *Id.* §§ 6.33-6.37.

Mandatory Deportation. Finally, immigration status may expose non-citizen defendants to what many will feel is the harshest consequence of all — mandatory deportation. As Petitioner describes, the immigration consequences of convictions have grown increasingly severe since 1990. *See* Pet'r Br 3-8. For example, the "aggravated felony" category of deportable offenses — once limited to crimes such as murder, drug trafficking, and gun trafficking — has expanded dramatically and now includes many non-violent crimes as well as certain misdemeanors and first offenses. *E.g., United States v. Christopher*, 239 F.3d 1191, 1192 (11th Cir. 2001) (misdemeanor shoplifting offense qualifies as "aggravated felony"). And where many non-citizens previously could obtain relief from deportation where the equities warranted it, *see St. Cyr*, 533 U.S. at 294-96, the class of non-citizens eligible for such relief has been greatly reduced. Today, "[e]ven a long-term permanent resident who is convicted of an aggravated felony will almost certainly be quickly deported, permanently banished, disqualified from all immigration benefits, subjected to mandatory

detention, and penalized by a sentence of up to twenty years in prison for illegal reentry after deportation." Dan Kesselbrenner & Lory D. Rosenberg, *Immigration Law and Crimes* § 1:7 (2008) [hereinafter *Kesselbrenner & Rosenberg*].

II. Standards of Conduct Long Accepted by Defense Counsel Require an Investigation Into Both the Penal and Immigration Consequences of Conviction.

In light of the harsh consequences that await the non-citizen defendant, both penal and immigration-related, criminal defense organizations have promulgated an extensive series of standards to govern the performance of counsel in this area. These standards are set out in the *NLADA Guidelines*, performance standards from the American Bar Association and local bar organizations, and numerous well-established practice guides. *E.g., NLADA Guideline* 6.2 and commentary. These standards all have at their core the "fundamental principle that attorneys must inform themselves of material legal principles that may significantly impact the particular circumstances of their clients." *People v. Pozo*, 746 P.2d 523, 529 (Colo. 1987).

A. Defense Counsel Must Investigate the Penal Consequences of a Defendant's Non-Citizen Status.

As a threshold matter, even if the immigration consequences of the plea are disregarded as "collateral" consequences — and they should not be — a defense attorney's failure to investigate the

implications of his client's non-citizen status falls short of professional standards because it leaves him unable to properly advise the client about *penal* consequences. Even attorneys who are unaware of immigration issues know that they must "attempt to secure the pretrial release of the client," *NLADA Guideline* 2.1; familiarize themselves with the "benefits the client might obtain from a negotiated settlement," *id.* 6.2(b); present the sentencing court with "all reasonably available mitigating and favorable information," *id.* 8.1(a)(3); and be familiar with the "place of confinement and level of security and classification," *id.* 8.2(b)(4). The attorney who advises the non-citizen client at all of these stages without pausing to consider the role of immigration status falls short of long-accepted duties in the most elemental of ways.

B. Defense Counsel Must Investigate the Immigration Consequences of Conviction.

In addition to core requirements about penal consequences, the defense community has long endorsed standards requiring investigation and advice about the immigration consequence of pleas.

NLADA Standards. Foremost among these are the Performance Guidelines for Criminal Defense Representation of *amicus* National Legal Aid & Defender Association (NLADA). *See NLADA Guidelines.* At the time the *Guidelines* were first adopted by the NLADA Board of Directors in 1994, NLADA had nearly fifty years of experience in the advocacy of quality defense representation, including extensive experience with "training attorneys

(especially those who directly represent poor defendants), filing amicus briefs in cases affecting the right to counsel, pooling information from defender officers and assigned counsel programs and disseminating it, educating public officials and the public at large about criminal justice issues that have an impact on the poor, and promulgating standards relating to the provision of counsel." *Id.* at xi. The *Guidelines* "reflect the knowledge and experience NLADA has gained in these endeavors, and represent the collective effort of experienced attorneys and law school professors." *Id.*

Many of the *Guidelines* underscore that competent defense counsel must take into account so-called "collateral" consequences such as deportation at all stages of the process. For example:

- At the *initial interview* stage, NLADA Guideline 2.2(b)(2)(A) makes clear that an attorney should determine his client's "immigration status."
- At the *plea bargaining* stage, NLADA Guideline 6.2(a) specifies that as part of an "overall negotiation plan" prior to plea discussions, counsel should make sure the client is fully aware of not only the maximum term of imprisonment but also a number of additional possible consequences of conviction, including "deportation"; *id.* 6.3(a) requires that counsel explain to the client "the full content" of any "agreement," including "the advantages and disadvantages and potential consequences"; and *id.* 6.4(a) requires that

prior to entry of the plea, counsel make certain the client "fully and completely" understands "the maximum punishment, sanctions, and other consequences" of the plea.

- Finally, at the *sentencing* stage, NLADA Guideline 8.2(b) requires that counsel be "familiar with direct and collateral consequences of the sentence and judgment, including . . . deportation"; and *id.* 8.3(a) requires the client be informed of "the likely and possible consequences of sentencing alternatives."

Other Standards. Many other professional defense standards emphasize similar themes. Most prominently, the Standards for Criminal Justice of the American Bar Association state: "[t]o the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea." *ABA Standards for Criminal Justice, Pleas of Guilty*, Standard 14-3.2(f) at 9 (3d ed. 1999). With respect to deportation, the ABA commentary emphasizes that "counsel should be familiar with the basic immigration consequences that flow from different types of guilty pleas, and should keep this in mind in investigating law and fact and advising the client." *Id.* at 127.

Several state and local bars have promulgated similar standards. For example, the New York State Bar Association requires public defenders to work to "avoid[], if at all possible, collateral consequences

including . . . deportation." New York State Bar Association, *Standards for Providing Mandated Representation*, Standard 1-7(a)(v) (2005); *see also* New York State Defenders Association (NYSDA), *Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York*, Standard VIII(A)(7) (2004); Massachusetts Committee for Public Counsel Services, *Performance Guidelines Governing the Representation of Indigent Persons in Criminal Cases*, Standard 5.4 (1999) ("Counsel must . . . advise the client . . . of the consequences of a conviction, including . . . possible immigration consequences"); *People v. Soriano*, 240 Cal. Rptr. 328, 333 (Ct. App. 1987) (as early as the 1980s, San Francisco public defender office "impose[d] on its staff attorneys . . . the duty to ascertain what the impact of the case may have on [the client]'s immigration status in this country") (internal quotation marks omitted; second bracket in original).

Practice Guides. Finally, practice guides and treatises for criminal defense have long reflected defense counsel's responsibility to investigate immigration consequences of plea bargains. One leading treatise advises that "[an] attorney who suspects that his client is an alien has a duty to inquire and to protect his client's immigration status." 3 *Criminal Defense Techniques* § 60A.01 (Scott Daniels & Ellen Smolinsky Pall eds., 2002). Similarly, a widely cited criminal defense treatise in use in the mid-1980's noted that "[n]o intelligent plea decision can be made by either lawyer or client without full understanding of the possible

consequences of a conviction . . . [including] [l]iability to deportation if the defendant is an alien." 1 Anthony G. Amsterdam, *Trial Manual 5 for the Defense of Criminal Cases* § 204 (1988).

C. These Standards Arise Out of Longstanding Ethical Rules That Emphasize the Lawyer's Obligation to Investigate the Issues Most Important to the Client in a Particular Representation.

The above standards emerge from the fundamental client-centered approach at the heart of defense counsel's role. Competent defenders recognize that proper representation begins with a firm understanding of the client's individual situation and overall objectives, and the "material legal principles that may significantly impact the particular circumstances" of that client. *Pozo*, 746 P.2d at 529. That requires a thorough exploration with the client of all important consequences of a client's decision to plead, regardless of whether those consequences are labeled "direct" or "collateral."

Such an approach inheres in all forms of competent legal representation. "Real estate lawyers protect their clients against tax disasters, even though they are not tax lawyers. Family lawyers protect their clients against criminal or tax liability, even though they are not criminal or tax lawyers. Civil lawyers protect their clients against criminal exposure, even though they are not criminal lawyers. Workers' compensation counsel must advise their clients of possible tort claims." *Tooby & Rollin* § 2.24 (footnote omitted).

The same core principles govern criminal defense. As two widely-cited commentators write:

> Consider this hypothetical "war story" of an applicant for a position at a public defender's office:
>
> > I represented someone charged with DUI, and due to my excellent advocacy the prosecutor accepted a guilty plea with a one-day sentence instead of the three days imposed in almost every similar case. As an interesting aside, my client and his family were then deported based on the conviction; I have no idea whether I could have negotiated a deal resulting in conviction of a non-deportable offense; status as an alien does not affect the fine or length of incarceration, so I never considered it. The results of this case demonstrate my remarkable legal abilities.
>
> Obviously, lawyers who ignore collateral consequences of legal actions are, to that extent, bad lawyers.

Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697, 718 (2002).

These principles arise out of three core ethical duties:

First, lawyers of all stripes recognize that their principal duty is to determine the client's goals and priorities in a particular representation. "Perhaps the most fundamental legal skill consists of

determining what kind of legal problems a situation may involve." American Bar Association, *Annotated Model Rules of Professional Conduct* 1.1 comment 2 (6th ed. 2007); *see also* Ky. Sup. Ct. R. 3.130, Rule of Prof. Conduct 1.1 comment 2 (same). In the context of criminal pleas, this may require an investigation into a number of potential consequences that could be important to the client. *See generally NLADA Guideline* 6.2 and commentary. Of course, "different clients will have different concerns as to the civil disabilities that may be incurred as a result of a criminal conviction," and no single "comprehensive checklist" could suffice. *Id.* at 6.2 commentary. But for the vast majority of non-citizens charged with crimes, the consequence of deportation — potentially the "loss of both property and life, or of all that makes life worth living," *Ng Fung Ho*, 259 U.S. at 284 — will be overwhelming. Often, as this Court has noted, "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." *St. Cyr*, 533 U.S. at 322 (quotation marks omitted).

Second, competent defense attorneys recognize that it is essential not only to recognize the key legal issues in the case, but also to have the necessary legal skills to properly advise about those issues. "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." ABA Model Rule 1.1; *see also id.* comment 6 ("To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice."); Kentucky Rule 3.130(1.1) (same). With respect to

the consequence of deportation, that means the attorney must understand which offenses are deportable and which are not. *See United States v. Kwan*, 407 F.3d 1005, 1016 (9th Cir. 2005) (attorney who wrongly advises client about immigration consequences violates "basic rule of professional conduct that a lawyer must maintain competence by keeping abreast of changes in the law and its practice").

Third, once the client's overall objectives for the representation are identified, competent criminal defense attorneys recognize that a client must be given the information needed to make sound choices about the representation. *See* ABA Model Rule 1.4(a) ("A lawyer shall . . . (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter"); *id.* comment 5 ("The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so."); *see also* Kentucky Rule 3.130(1.4(a)). If the potential consequence of deportation is important to the client, an attorney who fails to advise about this consequence falls short on this fundamental duty.

D. This Evolving Legal Duty Has Been Increasingly Accepted by Actors Throughout the Judicial System.

Further support for the foregoing standards comes from state and federal courts, prosecutors, and

state legislatures and rulemaking committees, all of whom have increasingly acknowledged the significance of immigration consequences in the plea bargaining context.

Courts. Many courts agree that lawyers should advise their clients about immigration consequences. Indeed, that principle formed the basis for this Court's ruling in *St. Cyr*, which barred the retroactive application of legislation limiting relief from deportation under Section 212(c) of the Immigration and Nationality Act on the grounds that non-citizen defendants who had already pleaded to crimes would have done so in reliance on their right to such relief. 533 U.S. at 322-23. The Court, relying on the amicus brief put forward by many of the signatories here, concluded that "[e]ven if the defendant were not initially aware of § 212(c), *competent defense counsel, following the advice of numerous practice guides, would have advised him* concerning the provision's importance." *Id.* at 323 n.50 (emphasis added).

Although a number of courts have dismissed immigration consequences under the misguided "collateral consequences" rule, *see* Pet'r Br. 25-35, several courts — particularly since the harsh immigration law amendments of 1996 — have rejected this rule and acknowledged that "an evolving sense of the lawyer's duty," *State v. Creary*, No. 82767, 2004 WL 351878, at *2 (Ohio Ct. App. 2004), requires that lawyers adhere to a higher standard. *See State v. Paredez*, 101 P.3d 799, 805 (N.M. 2004) ("the attorney must advise . . . [a non-citizen] client of the specific immigration

consequences of pleading guilty, including whether deportation would be virtually certain"); *Creary*, 2004 WL 351878, at *2 ("such information should be given when it appears critical to the defendant's situation"); *Segura v. State*, 749 N.E.2d 496, 500 (Ind. 2001) ("the failure to advise of the consequences of deportation can, under some circumstances, constitute deficient performance"); *United States v. Couto*, 311 F.3d 179, 188 (2d Cir. 2002) (open question whether "standards of attorney competence have evolved to the point that a failure to inform a defendant of the deportation consequences of a plea would by itself now be objectively unreasonable"); *see also Pozo*, 746 P.2d at 529; *Soriano*, 240 Cal. Rptr. at 335-36.

Moreover, many courts that dismiss deportation as a "collateral consequence" — and thus fail to meaningfully analyze the ineffectiveness standard — nonetheless acknowledge that competent lawyers *should* advise their clients regarding these consequences. These holdings, too, support the standards advanced by *amici* here. *See Rubio v. State*, 194 P.3d 1224, 1232 n.47 (Nev. 2008) ("advising a client considering a guilty of all foreseeable consequences, whether direct or collateral, makes for good practice"); *Gonzalez v. State*, 134 P.3d 955, 959 (Or. 2006) ("We recognize that it may be better practice for defense counsel to provide, to the extent possible, . . . specific advice about the likelihood of deportation"); *United States v. Banda*, 1 F.3d 354, 356 (5th Cir. 1993) ("This is not to say that [counsel] should not advise the client on possible deportation — he should."); *United States v.*

DeFreitas, 865 F.2d 80, 82 (4th Cir. 1989) ("ideally, counsel will inform the client of the possible consequences"); *United States v. Campbell*, 778 F.2d 764, 769 (11th Cir. 1985) ("It is highly desirable that both state and federal counsel develop the practice of advising defendants of the collateral consequences of pleading guilty.").

Legislatures and Rule-Making Bodies. State legislatures and drafters of criminal procedural rules have also recognized the significance that immigration consequences may have for a criminal defendant. Thirty jurisdictions including the District of Columbia and Puerto Rico have statutes, rules, or standard plea forms that require a defendant to receive notice of potential immigration consequences before the court will accept his guilty plea. *See* Appendix B (listing provisions). That the defendant receives the notice before entering a plea suggests that legislatures and rules drafters contemplated that defense counsel would respond to any questions the notice triggered for a defendant. Indeed, several of these provisions specifically require that the court ascertain whether the defendant has had a chance to discuss the matter with counsel. *See, e.g.*, Conn. Gen. Stat. Ann. § 54-1j ("If the defendant has not discussed these possible consequences with the defendant's attorney, the court shall permit the defendant to do so prior to accepting the defendant's plea."); Md. Rule 4-242(e) (court must advise "that the defendant should consult with defense counsel if the defendant is represented and needs additional information concerning the potential consequence of the plea");

N.M. Dist. Ct. R. Cr. P. 5-303(F)(5) ("if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the immigration consequence of a plea").

Prosecutors. Finally, prosecutors also recognize that so-called "collateral" consequences play a crucial role in plea negotiations. *See* Pet'r Br. 44-47. Prosecutors are not charged merely with the obligation to seek the maximum punishment in all cases, but with the broader obligation to "see that justice is accomplished." National District Attorneys Association, *National Prosecution Standards* § 1.1 (2d ed. 1991). Prosecutors are thus trained to take these collateral consequences into account during the course of plea bargaining. *E.g.* U.S. Dep't of Justice, *United States Attorneys Manual, Principles of Federal Prosecution*, § 9-27.420(A) (1997) (in determining whether to enter into a plea agreement, "the attorney for the government should weigh *all relevant considerations*, including . . . [t]he probable sentence *or other consequences* if the defendant is convicted") (emphasis added); *see also* Robert M.A. Johnson, *Collateral Consequences, Message from the President of the National District Attorney's Association*, May-June 2001 ("[a]s a prosecutor, you must comprehend the full range of consequences" flowing from conviction). Of course, if prosecutors are required to take these consequences into account, so too should defense attorneys. *See* Pet'r Br. 47.

III. Complying With This Duty Does Not Impose an Undue Burden Upon Defense Counsel.

The Court may be concerned that if defense counsel must advise their clients about immigration consequences of convictions, such a ruling would impose an undue burden on those attorneys — straining resources or detracting from other essential duties. *Amici* are as sensitive as anyone to the concerns that arise when new obligations are added to those we already have undertaken. Yet we are united in our belief that these obligations are not only appropriate, but essential. Indeed, we have long incorporated these obligations into the standards we demand of our members. We believe that these obligations also reflect appropriate constitutional standards of practice.

There are several reasons why this is so. First, although the burden of advising clients about immigration consequences is not inconsequential, it is also not insurmountable. We do not advocate a flat rule that requires defense attorneys to follow a "checklist" or inflexible set of rules in each case, only a commonsense approach that is tailored to our clients' individual needs. For many clients this detailed investigation and advice regarding immigration consequences may be required. For others it will not. This approach recognizes that "[n]o particular set of detailed rules . . . can satisfactorily take account of the variety of

circumstances faced by defense counsel." *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984).[3]

Nor will investigating immigration consequences require, in most cases, an undue amount of factual or legal research. We do not mean to minimize the complexities that immigration law can present in particular cases; but for most defendants, the determination as to whether a crime is a deportable one can be made with a straightforward inquiry into the immigration statute or caselaw. This is emphatically so in the area of drug laws — the laws applying to Petitioner — which are among the most straightforward in terms of their harsh, and typically mandatory, deportation consequences. *See Rollins v. Georgia*, 591 S.E.2d 796, 799 (Ga. 2004) (that non-citizen was deportable based on drug law violation is "a fact that would have been easily discovered through simple research"); *In re Resendiz*, 19 P.3d

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[3] In cases such as Petitioner's, prejudice is shown where the defendant, as a result of counsel's errors, accepted a plea rather than go to trial. But prejudice is not limited to this situation. *Strickland* requires "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. This standard has been applied to a variety of scenarios, *see, e.g., Glover v. United States*, 531 U.S. 198, 202-03 (2001) (counsel's errors resulted in higher sentence than would otherwise have been imposed); *Magana v. Hofbauer*, 263 F.3d 542, 550 (6th Cir. 2001) (counsel's errors led defendant to reject plea and go to trial). Many non-citizens would take a different plea — even one carrying a longer prison term — to avoid deportation. *See St. Cyr*, 533 U.S. at 322. Thus, where counsel fails, as a result of professional errors, to obtain a plea bargain that would have avoided or mitigated immigration consequences, this also plainly satisfies *Strickland*.

1171, 1185 (Cal. 2001) ("Controlled substance violations are the most damning convictions in the Immigration and Nationality Act.") (internal citation and quotation omitted).

More importantly, as we explain below, the defense counsel who wishes to provide appropriate advice to the non-citizen client does not do so in a vacuum. A considerable array of resources has long existed to help defense counsel fulfill these professional obligations. These resources include a wide range of written treatises, online practice manuals, convenient reference guides, and state-specific guides that work through the laws of many jurisdictions and explain the immigration implications of each one. Many of these publications are available online and free of charge to defense attorneys. Moreover, criminal and immigration law organizations have engaged in an extensive nationwide effort to train defense attorneys in immigration issues and also to establish and maintain nationwide, statewide and regional hotlines that defense attorneys can utilize to get case-specific advice — hotlines that Petitioner's counsel could easily have called prior to misadvising his client. No competent practitioner can plausibly assert that it is an undue burden to make use of these readily-available resources.

A. There Is an Extensive Array of Resources Available at the National Level to Assist Criminal Defense Attorneys in Advising Their Non-citizen Clients.

A wide array of organizations has emerged in the past two decades to provide immigration assistance to criminal defense attorneys. The principal national organizations (now collaborating as the Defending Immigrants Partnership, *see infra*) are *amici* here.

National Immigration Project of the National Lawyers Guild (NIP/NLG). *Amicus* NIP/NLG is a national membership organization working to defend and expand the rights of immigrants in the United States. *See* www.nationalimmigrationproject.org. For nearly a quarter century, NIP/NLG has provided technical assistance to criminal defense practitioners seeking help in assessing the immigration consequences of criminal conduct. *See* Letter from Dan Kesselbrenner (May 14, 2009) [hereinafter *Kesselbrenner Letter*] (on file with NACDL).[4]

NIP/NLG provides many types of assistance to criminal defense practitioners. First, since 1986, NIP/NLG has provided direct technical assistance to practitioners who need advice with respect to a

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[4] In a letter dated June 1, 2009, *amici* alerted the Clerk of the Court that this brief would refer to several documents which are not publicly available. These documents are the types of materials of which the Court may take judicial notice, but in order to avoid any inconvenience to the Court, *amici* have not sought permission to lodge these materials with the Clerk of the Court at this time. As stated in the letter, *amici* are prepared to lodge copies of these materials should the Court wish.

particular case. These services are available free of charge and may be used by practitioners anywhere in the Nation, including Kentucky. *See* Letter from Margaret F. Case (Aug. 21, 2001) (on file with NACDL) (letter to Dan Kesselbrenner from Assistant Public Advocate at Kentucky Department of Public Advocacy acknowledging "your help last week" in advising regarding plea agreement for Laotian client). Since 2003, NIP has provided more than 3,000 instances of direct assistance to attorneys in all fifty states. *Kesselbrenner Letter* at 1. NIP/NLG also maintains an interactive listserv for practitioners to raise questions about individual cases and discuss legal developments. Since 2003 there have been nearly 10,000 posts to that listserv. *Id.* at 2.

NIP/NLG also has been providing trainings in the form of CLE seminars for lawyers since the year 1984. *Id.* at 2-3. These trainings have taken place in some 43 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, and attendees have participated from all fifty states, including Kentucky. *Id.* at 3. In total, NIP/NLG has trained more than 5,000 attorneys as well as hundreds of judges and law students. *Id.*; *see also St. Cyr Amicus* at App. 13-14 (partial list of pre-1996 NIP/NLG trainings). The purpose of these trainings is not merely to improve the skills of the attendees but also to "build an infrastructure of criminal defense attorneys who are experts on the immigration consequences of criminal conduct" so that those attorneys may, in turn, train others. *Kesselbrenner Letter* at 3.

NIP/NLG is also responsible for publishing *Immigration Law and Crimes*, the leading treatise on the relationship between immigration law and the criminal justice system. *See Kesselbrenner & Rosenberg, supra.* The book is an analytic resource for criminal defense attorneys with non-citizen clients, providing an overview of the interaction between immigration and criminal laws, cataloging crime-related deportation grounds, explaining the various discretionary remedies and waivers available to convicted immigrants, and providing an introduction to many other immigration law concepts. *Id.* at xvii to xxxi. Originally published in 1984, *Immigration Law and Crimes* is updated twice yearly and is also available on Westlaw. *Kesselbrenner Letter* at 2.

Finally, NIP/NLG also provides several resources on its website, www.nationalimmigrationproject.org. Among these are downloadable "quick reference charts" geared to the specific criminal laws of various jurisdictions, including New York, Illinois, California, and New Jersey, as well as federal crimes. These charts give busy criminal defenders a fast and easy way to determine the immigration consequences of a particular charge and to evaluate the possibility of other charges that would have less drastic consequences.

Immigrant Defense Project (IDP). *Amicus* IDP defends the legal, constitutional and human rights of immigrants facing criminal or deportation charges. *See* www.immigrantdefenseproject.org/index.htm. Although IDP is located in New York, its activities have a national impact. IDP operates a free

nationally-available hotline, advertised on its webpage, providing criminal defense lawyers with "training, legal support or guidance on criminal/immigration law issues." *Id.* That hotline has from the start accepted and encouraged calls from defense lawyers in not only New York but other states as well. Memorandum from Benita Jain (May 19, 2009), at 2 (on file with NACDL). Since its founding in 1997, IDP has provided individualized assistance in about 12,000 cases — nearly half of which were from criminal defense attorneys and advocates or their clients — and continues to respond to approximately 1,500 inquiries per year. *Id.* IDP also has trained dozens of in-house immigrant defense experts at local defender organizations in New York, New Jersey, Pennsylvania, and other states. *Id.*; *see also* www.immigrantdefenseproject.org/webPages/immigrationExperts.htm.

Like NIP/NLG, IDP maintains an extensive series of publications aimed at criminal defense practitioners. For example, visitors to the IDP's online resource page can find a free one-page reference guide summarizing various criminal offenses with immigration consequences. *See* www.immigrantdefenseproject.org/docs/06_ImmigrationConsequencesChecklist.pdf. The IDP website also contains free publications focusing on other aspects of immigration law relevant to criminal defenders, such as aggravated felonies and other serious crimes, and provides "quick reference charts" discussing the immigration consequences of crimes in various New York area jurisdictions. In addition, IDP publishes a

treatise aimed specifically at New York practitioners. *See* Manuel D. Vargas, *Representing Immigrant Defendants in New York* (4th ed. 2006).

Immigrant Legal Resource Center (ILRC). Like IDP, *amicus* ILRC is a regionally-based organization with a national reach. Founded in California in 1979, ILRC provides legal trainings, educational materials, and advocacy to advance immigrant rights. *See* www.ilrc.org/about_ilrc/index.php. For thirty years ILRC has provided a nationwide consultation service called "Attorney of the Day" that "offer[s] consultations on many aspects of immigration law to attorneys, employees of non-profit organizations, public defenders, and others assisting immigrants," including consultation on the immigration consequences of conviction. *See* www.ilrc.org/technical_assistance/index.php. ILRC's consultation services are available for a fee, which can be in the form of an hourly rate or via an ongoing contract. *See id.* These fees are reduced for public defenders. Many public defender offices in California contract with the ILRC to answer their questions on the immigration consequences of crimes.

In addition to its nationwide activities, ILRC also provides trainings and specialty publications in the Ninth Circuit. Since 1990 ILRC has published a widely-used treatise for defense attorneys with non-citizen clients in states covered by that Circuit. *See* Katherine Brady et al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes under California and Other State Laws* (10th ed. 2008). ILRC also provides subscribers with "quick reference" charts assessing the immigration consequences of

convictions in California and Arizona, and presents national webinars and full-day seminars to immigration and criminal defense attorneys throughout the states of the Ninth Circuit. *See* www.ilrc.org/immigration_law/criminal_and_immigration_law.php.

Defending Immigrants Partnership. Although the above organizations were all founded before 2002 — and hence were accessible to Petitioner's counsel at the time of the plea in this case -- the resources available to criminal defenders have since expanded further. An important recent development was the 2002 founding of the Defending Immigrants Partnership, a collaboration between the above organizations plus *amicus* National Legal Aid & Defender Association. The Partnership "coordinate[s] on a national level the necessary collaboration between public defense counsel and immigration law experts to ensure that indigent non-citizen defendants are provided effective criminal defense counsel to avoid or minimize the immigration consequences of their criminal dispositions." www.defendingimmigrants.org.

In addition to its national-level coordination activities, the Partnership offers many other services. For example, the Partnership coordinates and participates in trainings at both the national and the regional levels — including, since 2002, some 220 training sessions for about 10,500 people. *See* Appendix C (partial list of Partnership training sessions). In addition, the Partnership provides free resources directly to criminal defense attorneys through its website. That website contains an

extensive resource library of materials, including a free national training manual for the representation of non-citizen criminal defendants, *see* Defending Immigrants Partnership, *Representing Noncitizen Defendants: A National Guide* (2005-2008), as well as jurisdiction-specific guides for Arizona, California, Connecticut, Florida, Illinois, Massachusetts, New Jersey, New York, New Mexico, North Carolina, Texas, Vermont, Virginia, and Washington, *see id.* at ix. (Guides for several other states are published locally or nearing completion with assistance from the Partnership.) In addition, the website contains various quick-reference guides, charts, and outlines, national training powerpoint presentations, several taped webcastings, a list of upcoming trainings, and relevant news items and reports.

Other Publications and Nationwide Resources. There are many other resources available to criminal defense attorneys with non-citizen clients, including a wealth of books, treatises, law journal articles, and other publications which the competent practitioner can access. For example, California attorney Norton Tooby has published a number of widely-cited national practice manuals, including Norton Tooby, *Tooby's Guide to Criminal Immigration Law* (2008 ed.); Norton Tooby, *Tooby's Crimes of Moral Turpitude* (2007 ed.); Norton Tooby, *Criminal Defense of Immigrants* (4th ed. 2007); Norton Tooby & Joseph Justin Rollins, *Aggravated Felonies* (2006 ed.); and Norton Tooby & Joseph Justin Rollins, *Safe Havens* (2005 ed.). Many of these and other publications were available in 2002. *See, e.g.*, Norton Tooby & Katherine Brady, *Criminal Defense*

of Immigrants (2001); Tova Indritz, *Immigration Consequences of Criminal Convictions, in Cultural Issues in Criminal Defense* (James G. Connell II & Rene L. Valladares eds., 1st ed. 2000); later released as Tova Indritz & Jorge Baron, *Immigration Consequences of Criminal Convictions, in Cultural Issues in Criminal Defense* (Linda Friedman Ramirez ed., 2007).

In total, *amici* have identified almost 1,000 different publications and hundreds of training sessions for defenders throughout the nation on the immigration consequences of criminal convictions. A partial list of those publications and training sessions is included at Appendix C. A chart showing the resources available in each state is included at Appendix D.

B. These National Efforts Have Been Successfully Replicated on a Local Scale in Jurisdictions Throughout the Nation.

The efforts of the above organizations have filtered down to the local level in many jurisdictions — including Kentucky. First, as trainings carried out by the main national organizations have taken hold, many defender organizations have replicated these efforts internally, establishing in-house immigration experts to assist their defenders. Second, many local immigration organizations have established outreach with local defender organizations and private defense counsel, providing immigration advice either ad hoc or through formal structures.

Defender Organizations. Many defender organizations have established in-house immigration expertise. For example, *amicus* Legal Aid Society of the City of New York, which oversees public defender services in four of New York City's five boroughs, has an immigration unit which handles traditional immigration issues and also counsels attorneys in the criminal division. New York State Defenders Association & Immigrant Defense Project, *Protocol for the Development of a Public Defender Immigration Service Plan* 13 & n.25 (Working Draft May 2009), available online at www.immigrantdefenseproject.org/docs/095_Protocol_PD_Immigration_Plan.pdf [hereinafter *Protocol*]. Several other New York State defender offices maintain staff attorneys trained as immigration experts, including The Bronx Defenders, *amicus* Neighborhood Defender Service of Harlem, and the Monroe County Public Defenders Office. *Id.* at 10-11. These structures are the direct offshoot of efforts by groups such as *amicus* IDP, which has trained in-house immigration experts throughout New York and the nation. *See supra* at 27-29.

Public defender organizations elsewhere have found other ways to address this need. The California State Public Defender, for example, contracts with *amicus* ILRC to provide expert assistance to public defenders on a statewide basis, while the Los Angeles County Public Defender Office maintains immigration-trained counsel on its staff. *Protocol* at 12-13. *Amicus* Immigration Impact Unit of the Massachusetts Committee for Public Counsel Services provides trainings and consults on

individual cases regarding immigration consequences of criminal conduct for the nearly 3,000 public defenders and private, court-appointed criminal defense attorneys in Massachusetts. The Colorado State Public Defender Office also has a statewide program that ensures that public defenders within those states have access to immigration counsel where needed. *Id.* at 12, 15. Similar efforts have been implemented on a municipal level in other states. For example, *amicus* Defender Association of Philadelphia maintains two in-house immigration experts and also shares the services of an immigration expert with a local immigration provider. *Id.* at 12 & n.23.

The criminal defender and immigrant defense organizations with the longest track records in this area are also working to share their knowledge and experience with others. *Amici* NYSDA and IDP published the above-cited *Protocol* to show defender offices across the nation "how to get started implementing an Immigration Service Plan, and how an office with limited resources can phase in such a plan under realistic financial constraints." *Id.* at 2. To that end, the *Protocol* surveys the various approaches that different defender organizations have taken, discusses considerations distinguishing those approaches, and provides contact information for key people in each organization.

Criminal-Immigration Networks. Outside of formal public defender structures, there are many other organizations that provide immigration advice to defenders on a regional basis, forming criminal-immigration ("crim-imm") networks. To take just

one example, in 2007 the Arizona Foundation for Legal Services and Education launched the Arizona Defending Immigrants Partnership, "a highly successful and effective model for providing information to criminal defense attorneys on the immigration consequences of criminal convictions." Letter from Kara Hartzler (May 14, 2009), at 1 (on file with NACDL). This Partnership created (and continually updates) a 185-page "Quick Reference Chart for Determining the Immigration Consequences of Selected Arizona Offenses" (which received 112,741 hits on its website between 2007-2008). *Id.* A position was also created at a local immigration service provider, *amicus* Florence Immigrant and Refugee Rights Project (FIRRP) to provide free trainings and individual consultations on the immigration consequences of Arizona crimes. In its first two years the Partnership has trained over 1,200 defense attorneys and provided over 1,000 individual consultations to both public and private defenders (consultations that identified pleas to avoid or mitigate immigration consequences over 60% of the time). *See id.* at 1-2.

Similarly, in Washington State, *amicus* Washington Defender Organization (WDA) established its Immigration Project in 1999 with a mission to "defend and advance the rights of non-citizens within the criminal justice system, non-citizens facing the immigration consequences of crimes, and non-citizens facing the detrimental impacts of increased state and federal immigration enforcement practices." Memorandum from Ann Benson (Apr. 23, 2009), at 1 (on file with NACDL).

Like its Arizona counterpart, the WDA project provides case-by-case technical assistance and offers ongoing training and education to criminal defenders, prosecutors, judges and other entities within the criminal justice system. *Id.* Since 1999, WDA's Immigration Project has provided individual assistance in over 10,000 cases, and has been able to offer solutions for avoiding or mitigating immigration consequences in approximately 70% of its consultations. *Id.* at 1-2. Most of those cases involve Washington defenders, but the Project does not refuse anyone and has provided assistance throughout the United States. *Id.* at 2. The Project has also trained more than 5,000 people and maintains on its website, www.defensenet.org, a free downloadable version of a guide to the immigration consequences of offenses under the Revised Code of Washington. *Id.*

Similarly, in New Mexico, *amicus* New Mexico Criminal Defense Lawyers Association (NMCDLA) actively assists defenders in that state concerning immigration issues. Both before and after the decision in *Paredez*, NMCDLA has presented several continuing legal education programs in various locations of the state on the immigration consequences of criminal convictions and the duty of criminal defense lawyers when the client is not a U.S. citizen. NMCDLA regularly publishes a newsletter in which one ongoing column in each issue is dedicated to immigration consequences. An NMCDLA member co-teaches a course at the University of New Mexico Law School on the immigration consequences of criminal convictions;

the students are both law students and state public defenders and part of the class involves the students working on the public defenders' cases of non-U.S. citizen clients. Some criminal defense lawyers and some immigration lawyers in New Mexico regularly advise criminal defense lawyers about such consequences. Moreover, the state public defender has taken steps to incorporate this information in the representation of clients. *See* Letters from Tova Indritz (May 22, 2009) (on file with NACDL).

Resources in Kentucky. The Kentucky Association of Criminal Defense Lawyers, *amicus* here, shares the belief that ethical norms require that advice as to the consequences of non-citizen status be provided where it is critically important to the particular client, and that doing so is fundamentally practicable. Defenders in Kentucky have devoted resources and effort to be able to do just this: provide adequate criminal defense counseling and advocacy to non-citizen defendants.

One leader in this area in Kentucky is the state public defender, known as the Department of Public Advocacy (DPA). The DPA has incorporated training regarding the consequences of immigration status for criminal defendants into its annual conferences. *See* Letter from Damon Preston (June 1, 2009) (on file with NACDL). This topic is also part of the training for all new defense attorney staff that is run by the centralized DPA training office. *Id.* The DPA website contains a link to NLADA's Resource Page for Immigration-Related Criminal Defense Issues. *See* Ky. Department of Public Advocacy, Defender Resources, http://dpa.ky.gov/dr.htm. The DPA

statewide magazine has published articles on the issues involved in representing immigrant defendants. *See, e.g.,* Jay Barrett, *Race and Immigration Issues*, The Advocate, May 2008, at 69-75 (discussing immigration implications of certain Kentucky laws); Dan Kesselbrenner & Sandy Lin, *Selected Immigration Consequences of Certain Federal Offenses*, The Advocate, May 2008, at 76-93; William Hilyard & Sora King, *Immigration Pathfinder*, The Advocate, Jan. 2002, at 52 (listing "DPA library's resources on issues relating to the representation of Non-US citizens").

Another example is the work of the Louisville-Jefferson County Public Defender's office.[5] The Louisville office incorporates instruction on the immigration consequences of a criminal conviction into its new attorney orientation and training, as well as in its ongoing in-house training program for all staff attorneys. *See* Letter from Daniel T. Goyette (June 1, 2009) (on file with NACDL). The office has also organized CLE events on the topic at which national experts such as Dan Kesselbrenner of the National Immigration Project have addressed the defender staff. Staff attorneys are directed to be alert to the issue in the representation of clients; and, if they are representing a non-citizen defendant, to bring that to the attention of their supervisor so that appropriate advice can be given and expert resources can be accessed if need be. The Louisville office also successfully lobbied to ensure that judges

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[5] The Louisville office is structurally distinct from the statewide DPA.

in that jurisdiction include a question regarding immigration status in their plea colloquies. *Id.*

Efforts to be attuned to these issues are not confined to the more urban areas. As an example, in the La Grange local defender office, one of the trial attorneys has worked diligently to obtain training from the Defending Immigrants Partnership on the issue and has come to be a local resource on the topic for other defenders in the counties in which she works, including by helping them connect with outside expert resources. Letter from Melanie Lowe (May 28, 2009), at 1 (on file with NACDL). During her nine years as a defender, this attorney has routinely handled cases involving non-citizen clients, has obtained information to advise her clients on those consequences where needed, including from non-profit organizations in Kentucky, and in a number of instances has been able to negotiate resolutions to avoid or mitigate immigration consequences. *Id.*

In attacking this issue, the DPA and Louisville defender have worked collaboratively with non-profit organizations in the state that provide training and consultation resources on the topic — the Maxwell Street Legal Clinic, in Lexington, KY, and the Catholic Charities of Louisville, Inc. These non-profit organizations do not limit their assistance to the public defender service, however, but are also available to Kentucky's private criminal defense bar.

CONCLUSION

The judgment of the Kentucky Supreme Court should be reversed.

Respectfully submitted,

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APPENDIX A: SEPARATE STATEMENTS OF INTEREST OF *AMICI CURIAE*

The **National Association of Criminal Defense Lawyers** (NACDL) is a non-profit corporation with more than 12,000 members nationwide, and 28,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

Founded in 1958, NACDL promotes criminal law research, advances and disseminates knowledge in the area of criminal practice, and encourages integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving the constitutional standards for effective criminal defense counsel. NACDL has a particular interest in this case because the Supreme Court of Kentucky held that it is not ineffective assistance for a criminal defense attorney to misadvise a client about immigration consequences of a conviction because those consequences are "collateral" — a decision that would undermine the standards of effective attorney performance that NACDL and its members have repeatedly advocated.

The **National Legal Aid & Defender Association** (NLADA) is the nation's leading advocate for front-line attorneys and other equal justice professionals — those who make a difference in the lives of low-income clients and their families and

communities. Representing legal aid and defender programs, as well as individual advocates, NLADA is proud to be the oldest and largest national, nonprofit membership association devoting 100 percent of its resources to serving the broad equal justice community. NLADA and its members are keenly aware of the need to accurately advise a client of those consequences of a plea agreement that are significant to the client's ability to make an informed decision, such as the immigration consequences at issue in this lawsuit. Indeed, NLADA has developed performance guidelines for criminal defense representation that specifically call on defense attorneys to advise their clients about such collateral consequences. NLADA is also a founding partner of the Defending Immigrants Partnership, which was established in 2002 in order to assist individual defenders and defender organizations with immigration-related issues.

The **Kentucky Association of Criminal Defense Lawyers** (KACDL) is a statewide, voluntary professional association of lawyers, paralegals and law students, including both private criminal defense attorneys and public defenders. KACDL, which was founded in 1986, promotes the fair administration of justice, ensuring the rights of Kentucky citizens accused of crimes. Educating its members, the Kentucky General Assembly and the public is part of KACDL's mission. Recognizing KACDL's role in the justice system, the legislature has reserved a seat for the KACDL president or his designee on Kentucky's Criminal Justice Council, a body which conducts research and recommends legislative and policy

changes on significant criminal justice issues. KACDL regularly files *amicus* briefs on important criminal law and procedure issues in the Kentucky appellate courts. The organization has a particular interest in the issue before this Court because of the extremely prejudicial consequences that resulted from the incorrect legal advice about the immigration consequences of a conviction provided by an uninformed, unprepared lawyer. A holding that such misrepresentation does not constitute ineffective assistance of counsel because those consequences are "collateral" is inconsistent with the standards of practice KACDL espouses.

The **Colorado Criminal Defense Bar** (CCDB), founded in 1979, is a non-profit membership organization dedicated to protecting the rights of the criminally accused through training and resource development for criminal defense professionals, as well as legislative and other policy reform initiatives. Its membership consists of almost 1,000 criminal defense attorneys and support professionals, both in private practice and in Colorado's state-wide public defender system.

The **Immigration Impact Unit of the Massachusetts Committee for Public Counsel Services** provides trainings and consults on individual cases regarding immigration consequences of criminal conduct for the nearly 3,000 public defenders and private, court-appointed, attorneys in Massachusetts who represent indigent defendants. The Committee for Public Counsel Services (CPCS) is statutorily mandated to provide counsel for indigent defendants in criminal

proceedings in Massachusetts state courts. A significant percentage of CPCS' clients are non-citizens, many of whom came to the United States as children, have lived in this country for many years, and have spouses and dependents here. Standard 5.4 of the CPCS Performance Guidelines Governing the Representation of Indigent Persons in Criminal Cases mandates that attorneys advise their clients of any potential immigration consequences prior to changes of plea. The Immigration Impact Unit was established by CPCS in recognition of the significant impact of immigration consequences on its non-citizen clients. We have an interest in this case due to our belief that zealous, competent representation includes providing knowledgeable advice to our clients about potentially devastating immigration consequences.

The **New Mexico Criminal Defense Lawyers Association** (NMCDLA) is a statewide non-profit voluntary professional membership association of over 450 New Mexico attorneys, including both public and private criminal defense lawyers, with an interest in the constitutional guarantees of fairness in the criminal justice system. Dedicated to improvement of the criminal justice system, NMCDLA provides support, education and training for attorneys who represent persons accused of crime. NMCDLA also advocates fair and effective criminal justice in the courts, the legislature and in the community. NMCDLA endeavors to provide courts with its members' perspective on issues important to the criminal and juvenile justices systems, presents its views in the legislature and in

the community for fair and effective criminal justice for all, and provides support to its members in the representation of their individual clients, including continuing legal education, and communication and assistance to its members. NMCDLA is affiliated with the National Association of Criminal Defense Lawyers.

The **New York State Defenders Association (NYSDA)** is a not-for-profit membership association of more than 1600 public defenders, legal aid attorneys, 18-B counsel, private practitioners and others throughout the state. With funds provided by the State of New York, NYSDA operates the Public Defense Backup Center, which offers legal consultation, research, and training to more than 5,000 lawyers who serve as public defense counsel in criminal cases in New York. The Backup Center also provides technical assistance to counties that are considering changes and improvements in their public defense systems. New York State contractually obligates NYSDA, through its Public Defense Backup Center, "to review, assess and analyze the public defense system in the state, identify problem areas and propose solutions in the form of specific recommendations to the Governor, the Legislature, the Judiciary and other appropriate instrumentalities." In this capacity, the Association has issued numerous reports identifying problems in the state's public defense system.

The **Oregon Criminal Defense Lawyers Association** ("OCDLA") is a 1,281-member non-profit organization of private criminal defense attorneys, public defenders, investigators and others engaged in

criminal and juvenile defense. OCDLA advocates for the interests of its members, the criminal defense bar, and criminal defendants, and provides education and training on criminal defense law and practice.

The **Texas Criminal Defense Lawyers Association** (TCDLA) is a Texas non-profit corporation with a membership of more than 2900 attorneys practicing in the State of Texas. TCDLA was organized more than 37 years ago with the following purposes: (1) to protect and ensure by rule of law those individual rights guaranteed by the Texas and United States Constitutions in criminal cases, (2) to resist efforts to curtail such rights, (3) to encourage cooperation between lawyers engaged in the defense of citizens accused of crimes through educational programs and other assistance, and (4) through such cooperation, education, and assistance to promote justice and the common good.

Washington Defender Association ("WDA") is a nonprofit training and resource center dedicated to criminal justice issues in Washington State. It has worked since 1983 to improve the quality of the criminal defense bar in Washington and improve funding for public defense. WDA provides members with access to the most recent developments in criminal law through training seminars, publications, and its resource assistance, and WDA represents public defense issues at the state level in Olympia. The WDA was instrumental in the establishment of the State Task Force on Indigent Defense and has established standards for public defense services which have been endorsed by the Washington State Bar and referenced in legislation.

In 1999, WDA created the Immigration Project to defend and advance the rights of non-citizens within the Washington State criminal justice system and non-citizens facing the immigration consequences of crimes. Since its inception, WDA's Immigration Project has provided case-by-case technical assistance to defenders representing non-citizens in criminal proceedings, convened and participated in regular CLE programs on these issues, and worked with courts, prosecutors and defenders on policy issues impacting non-citizens in the criminal justice system. WDA's Immigration Project also provides extensive written resource materials on these issues.

The **Legal Aid Society of the City of New York** is the nation's oldest and largest provider of free legal services to low income persons in New York City. The Society provides a full range of legal services including criminal defense work, as well as civil legal services. The Society's Criminal Practice is one of the largest public defender programs in the country and serves as the primary provider of indigent defender services in New York City. The Civil Practice's Immigration Law Unit advises immigrants and criminal defense attorneys of the immigration consequences of criminal case dispositions and specializes in representing non-citizens with criminal convictions in removal proceedings in Immigration Court.

The **Neighborhood Defender Service of Harlem** is a lead innovator in holistic public defense practice. NDS represents clients using a team-based, client-centered, holistic defense model. A core aspect of holistic representation is the commitment

to search for the underlying issues that bring clients into contact with the criminal justice system, and to work with clients to help to avoid or minimize future contact with the system. As a part of its holistic approach, NDS incorporates immigration defense and immigration services into the representation it provides its non-citizen clients.

The **Defender Association of Philadelphia** is an independent non-profit organization representing indigent criminal defendants in the City of Philadelphia. The Defender Immigration Project is housed by the Association. The Project provides advice and support to the Association's one-hundred plus staff attorneys regarding the immigration consequences of its non-citizen clients. The Project also provides developmental trainings to the bar and the bench, and provides resources for the criminal bar of the greater Philadelphia region.

The **Florence Immigrant and Refugee Rights Project** (FIRRP) provides free legal services to over 10,000 immigrants, refugees, and U.S. citizens a year detained in Arizona by Immigration and Customs Enforcement (ICE). Through its Know-Your-Rights presentations, workshops, legal representation, and targeted services, FIRRP regularly identifies persons who are held in detention while pursuing meritorious claims before an immigration judge, the Board of Immigration Appeals (BIA), and the Ninth Circuit Court of Appeals. A large percentage of FIRRP's clients are affected by the immigration consequences of criminal convictions and the advisals given to them by their criminal defense attorneys.

The **Immigrant Defense Project** ("IDP") is a not-for-profit legal resource and training center dedicated to defending the legal, constitutional and human rights of immigrants. A national expert on the intersection of criminal and immigration law, IDP supports, trains and advises both criminal defense and immigration lawyers, as well as immigrants themselves, on issues that involve the immigration consequences of criminal convictions. IDP seeks to improve the quality of justice for immigrants accused of crimes and therefore has a keen interest in ensuring that immigrants in the nation's criminal justice system receive competent legal counsel regarding the immigration consequences of criminal convictions.

The **Immigrant Legal Resource Center** (ILRC), founded in 1979, is a national back-up center that provides technical assistance, training, publications, and assistance in advocacy to low-income immigrants and their advocates. Among its other areas of expertise, the ILRC is known nationally as a leading authority on the intersection between immigration and criminal law. Its publications include *Defending Immigrants in the Ninth Circuit* (formerly *California Criminal Law and Immigration*) (ILRC 2008), which has been cited by the Ninth Circuit Court of Appeals and the California Supreme Court, and a chapter entitled *Representing a Non-citizen Criminal Defendant* in *California Criminal Law Procedure and Practice* (Continuing Education of the Bar, 2009). The ILRC provides daily assistance to criminal and immigration defense counsel on issues relating to citizenship, immigration

status and the immigration consequences of criminal convictions.

The **National Immigration Project of the National Lawyers Guild** (National Immigration Project) is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws. The National Immigration Project provides legal training to the bar and the bench on the immigration consequences of criminal conduct and is the author of *Immigration Law and Crimes* and three other treatises published by Thomson-West. The National Immigration Project has participated as *amicus curiae* in several significant immigration-related cases before this Court.

APPENDIX B: STATE STATUTES, RULES, OR STANDARD PLEA FORMS REQUIRING ADVISAL OF IMMIGRATION CONSEQUENCES

Alaska:	Alaska R. Crim. P. 11(c)(3)
Arizona:	Ariz. R. Crim. P. 17.2(f)
California:	Cal. Penal Code § 1016.5
Connecticut:	Conn. Gen. Stat. Ann. § 54-1j
District of Columbia:	D.C. Code Ann. § 16-713
Florida:	Fla. R. Crim. P. 3.172(c)(8)
Georgia:	Ga. Code Ann. § 17-7-93(c)
Hawaii:	Haw. Rev. Stat. §§ 802E-1, 802E-2, 802E-3
Idaho:	Idaho Crim. R. 11(d)(1)
Illinois:	725 ILCS 5/113-8
Iowa:	Iowa Code Ann. R. 2.8(2)(b)(3)
Kentucky:	Ky. Admin. Office of Courts, Form AOC-491 (Rev. 2/2003)
Maine:	Me. R. Crim. P. 11(h)
Maryland:	Md. Rule 4-242(e)
Massachusetts:	Mass. Gen. Laws Ann. ch. 278, § 29D
Minnesota:	Minn. R. Crim. P. 15.01 subd. 1(10)(d) (felony cases); Minn. R. Crim. P. 15.02(2) (misdemeanor cases)

Montana:	Mont. Code Ann. § 46-12-210(1)(f)
Nebraska:	Neb. Rev. Stat. § 29-1819.02
New Jersey:	N.J. Directive # 14-08 (Oct. 8, 2008)
New Mexico:	N.M. Dist. Ct. R. Cr. P. 5-303(F)(5)
New York:	N.Y. Crim. Proc. Law § 220.50(7)
North Carolina:	N.C. Gen. Stat. § 15A-1022(a)(7)
Ohio:	Ohio Rev. Code Ann. § 2943.031
Oregon:	Or. Rev. Stat. § 135.385(2)(d)
Puerto Rico:	P.R. Laws Ann. tit. 34, App. II, Rule 70
Rhode Island:	R.I. Gen. Laws § 12-12-22
Texas:	Tex. Code Crim. Proc. Ann. art. § 26.13(a)(4)
Vermont:	Vt. Stat. Ann. tit. 13, § 6565(c)
Washington:	Wash. Rev. Code § 10.40.200
Wisconsin:	Wis. Stat. § 971.08(1)(c)

APPENDIX C: SAMPLE RESOURCES ON THE IMMIGRATION CONSEQUENCES OF CRIMINAL DISPOSITIONS

1. National Trainings and Written Resources (Chronological Order)

Larry Ainbinder, *Special Considerations in Representing the Non-Citizen Defendant, in Defending a Federal Criminal Case* (1983 - 2000).

Dan Kesselbrenner & Lory Rosenberg, *Immigration Law & Crimes* (1984-2007).

Kari Converse, *Criminal Law Reforms: Defending Immigrants in Peril*, The Champion (NACDL, Aug. 1997).

Training: Immigration Consequences of Criminal Convictions, National Legal Aid & Defender Association (NLADA) (Dec. 12, 1998).

Ramirez, Capriotti, Kay & Unger, *Small-Time Crime, Big-Time Trouble: The New Immigration Laws*, 13 Criminal Just. 4 (1998).

Training: Immigration Consequences of Criminal Convictions, NLADA (1998).

B. John Ovink, *Why a Plea Bargain May No Longer Be a Bargain for Legal Permanent Resident Aliens*, 46 Fed. Law 49 (May, 1999).

William R. Maynard, *Deportation: An Immigration Law Primer for the Criminal Defense Lawyer*, The Champion (NACDL, June 1999).

Training: Immigration Consequences of Criminal Conduct, National Immigration Project (NIP) (Oct. 13, 1999).

Training: Immigration Consequences of Criminal Convictions, National Association of Criminal Defense Lawyers (NACDL) (Aug. 4, 2000).

Training: Immigration Consequences of Criminal Conduct, NIP (Nov. 1, 2000).

Tova Indritz, *Immigration Consequences of Criminal Convictions, in Cultural Issues in Criminal Defense* (J. Connell & R. Valladares, eds. 2000).

Kari Converse, *Defending Aliens in Criminal Cases, in* 3 *Criminal Defense Techniques* (Scott Daniels & Ellen Smolosky Pall eds. 2000).

Anna Marie Gallagher, *Immigration Consequences of Criminal Convictions: Protecting Your Client's Immigration Interests in Criminal Proceedings*, 2001 Immig. Briefings 1 (April 2001).

Robert James McWhirter, *The Criminal Lawyer's Guide to Immigration Law: Questions and Answers* (A.B.A. 2001).

Norton Tooby & Katherine Brady, *Criminal Defense of Immigrants* (2001-2007).

Immigration Consequences of Convictions Checklist (Immigrant Defense Project, 2001-2008).

Tova Indritz, *Puzzling Out the Immigration Consequences of Various Criminal Convictions: Part I*, 26 The Champion 12 (Jan.-Feb., 2002); *Part II*, 26 The Champion 20 (Mar., 2002); *Part III*, 26 The Champion 22 (April, 2002).

Robert James McWhirter, *Immigration Law for Criminal Lawyers: Overview* (Winter, 2002).

Norton Tooby, Jennifer Foster & Joseph J. Rollin, *Crimes of Moral Turpitude* (2002-2008).

Training: Immigration Consequences of Criminal Convictions, NLADA (Nov. 2003).

Norton Tooby & Joseph J. Rollin, *Aggravated Felonies* (2003-2006).

Peter Markowitz, *Practice Tips to Avoid Aggravated Felonies* (Oct. 1, 2003).

Jennifer Welch, *Defending Against Deportation: Equipping Public Defenders to Represent Non-citizens Effectively*, 92 Cal. L. Rev. 541 (2004).

Manuel D. Vargas, *Tips on How to Work With an Immigration Lawyer to Best Protect Your Non-citizen Defendant Client* (2004).

Training: Immigration Consequences of State Criminal Convictions, Defending Immigrants Partnership (DIP) (July 14-15, 2005).

Norton Tooby & Joseph J. Rollin, *Safe Havens: How to Identify and Construct Non-Deportable Offenses* (2005).

Representing Non-citizen Criminal Defendants: A National Guide by the Defending Immigrant Partnership (2005-2008).

Training: Immigration Consequences of Criminal Convictions, DIP (July 13-14, 2006).

Training: Defending Against Immigration Consequences of Criminal Dispositions, NLADA (Nov. 9, 2006).

Training: Immigration Criminal Law, NLADA (Feb. 22, 2007).

Training: Immigration Consequences of State Criminal Convictions, Las Vegas, Nev. (Sept. 27-28, 2007)

Training: Immigration Consequences of State Criminal Convictions, DIP (Sept. 2008).

Training: Immigration Consequences of Criminal Convictions, NLADA (Nov. 2008).

2. State Trainings and Written Resources

Alabama

Immigration Law and Crimes, Alaska State Bar, online seminar (Jan. 13, 2009).

Alaska

Training: Immigration Consequences of Criminal Convictions, Alaska Public Defender Agency (1999).

Training: Immigration Consequences of Criminal Convictions Alaska Public Defender Agency (2001).

Arizona

Kathy Brady *et al.*, *Quick Reference Chart & Annotations for Determining Immigration Consequences of Selected Arizona Offenses* (2008).

Kara Hartzler, Immigration Consequences of Your Client's Criminal Case (2008).

Training: Representing Criminal Aliens, State Bar of Arizona (March 10, 2006, Seminar on DVD).

Training: Immigration Consequences of Criminal Convictions, Arizona Public Defenders Association (June 2007).

Arkansas

Susan L. Pilcher, *Justice Without a Blindfold: Criminal Proceedings & the Alien Defendant*, 50 Ark. L. Rev. 269 (1997).

California

Katherine Brady, *Defending Immigrants in the Ninth Circuit (formerly California Criminal Law and Immigration)* (1999-2008).

Katherine Brady, *Quick Reference Chart to Determining Selected Immigration Consequences to Select California Offenses* (1999-2008).

Training: Representing Non-citizen Criminal Defendants, Cal. Public Defenders Association (Jan. 27, 2007).

Training: Immigration Consequences of Criminal Convictions, State Bar of California (March 24, 2008).

Colorado

Hans Meyer, *Plea & Sentencing Strategy Sheets for Colorado Felony Offenses & Misdemeanor Offenses* (Colo. State Public Defender 2009).

Training: Immigration Consequences of Criminal Convictions, Colorado Criminal Defense Bar, Denver, Colo. (Spring, 2006).

Training: Immigration Consequences of Criminal Convictions, Colorado Public Defender System (Fall, 2007).

Training: Immigration Consequences of Criminal Pleas & Convictions, Colorado Bar Association (March 26, 2008).

Connecticut

Jorge L. Baron, *A Brief Guide to Representing Non-Citizen Criminal Defendants in Connecticut* (2005-2007).

Elisa L. Villa, *Immigration Issues in State Criminal Court: Effectively Dealing with Judges, Prosecutors, and Others* (Conn. Bar Inst., Inc., 2007).

Training: Immigration Consequences of Criminal Convictions, Connecticut Criminal Defense Lawyers Association (April 2004).

Training: Collateral Consequences of Arrest, Incarceration, & Conviction (Immigration Consequences), Connecticut Division of Public Defender Services, Hartford, Conn. (Oct. 23, 2008).

Delaware

Training: Immigration Consequences of Criminal Convictions, National Immigration Project, Wilmington, Del. (Oct. 22, 1999).

District of Columbia

Gwendolyn Washington, *PDS Immigrant Defense Project's Quick Reference Sheet* (Public Def. Serv., 2008).

Training: Immigration Consequences of Criminal Convictions, Public Defender Service, Washington, DC (June 11, 2002).

Training: Immigration Consequences of Criminal Proceedings, Public Defender Service, Washington, DC (July 11, 2006).

Florida

Eric Pinkard, *Representing the Foreign Nat'l in Criminal Court: Deportation Consequences of a Criminal Conviction and Overcoming Problems of Communication*, 73 Fla. B.J. 16 (June, 1999).

Quick Reference Guide to the Basic Immigration Consequences of Select Florida Crimes (Fla. Imm. Advocacy Ctr. 2003).

Training: Immigration Consequences of Convictions, Defending Immigrants Partnership (Oct. 2003).

Training: Dealing with the Effects of Clients' Criminal Activity on their Immigration Status, Florida Bar (Feb. 8, 2008).

Georgia

Grace A. Sease & Socheat Chea, *The Consequences of Pleas in Immigration Law*, 6 Ga. B.J. 2 (Oct. 2000).

Christina Hendrix & Olivia Orza, *No Second Chances: Immigration Consequences of Criminal Charges*, 13 Ga. B.J. 4 (Dec. 2007).

Training: Immigration Consequences & Ethical & Professional Considerations, Georgia Public Defender Standards Council (Oct. 17, 2005).

Hawaii

Training: Immigration Consequences of Criminal Dispositions in Hawaii, Training by University of California Davis School of Law (2008).

Idaho

Training: Immigration Consequences of Criminal Convictions, Idaho Association of Criminal Defense Lawyers (2002).

Illinois

Maria Baldini-Poterman, *Defending Non Citizens in Illinois Courts* (Midwest Imm. & Hum. Rts. Ctr., 2001).

Selected Immigration Consequences of Certain Illinois Offenses (National Immigration Project, 2003).

Training: Immigration Consequences of Criminal Offenses, Illinois State Bar Association, Chicago, Ill. (May 1, 2009).

Indiana

Reference Pamphlet of the Immigration Consequences of Indiana Offenses (Indiana Public Defender Council, 2007).

Training: Immigration Consequences of Criminal Convictions, Marion County Public Defender Agency, Marion County, Ind. (May 22, 2002).

Training: Immigration Consequences of Criminal Convictions, Indiana Public Defender Council (2007).

Iowa

Jim Benzoni, *Defending Aliens in Criminal Cases CLE* (Training materials, 1994-1997).

Tom Goodman, *Immigration Consequences of Iowa Criminal Convictions Reference Chart.*

Trainings: Immigration Consequences of Criminal Convictions, Iowa State Public Defender (Biennial Seminars).

Kansas

Kathleen A. Harvey et al., *Disaster on the Horizon: It's Post-'Conviction' Time; Do You Know Where Your Alien Client Is?*, 73 J. Kan. B.A. 16 (Feb. 2004).

Kentucky

Kelly Kaiser, *A Lawyer's Guide: How to Avoid Pitfalls When Dealing With Alien Clients*, 86 Ky. L.J. 1183 (1997-1998).

Training: The Criminal Defendant & Immigration Law: What Every Public Defender Should Know Before Undertaking Representation of an Illegal Alien, Kentucky Department of Public Advocacy, Lexington, Ky. (June 12, 2001).

Training: Collateral Consequences to Conviction, Kentucky DPA (June 12, 2002).

Training: Immigration and Criminal Law, Kentucky DPA , Louisville, Ky. (June 8, 2005).

Training: Immigration Consequences of Criminal Convictions, National Network to End Violence Against Immigrant Women, Lexington, Ky. (Nov. 4, 2005).

Training: Immigration Consequences of Crime, Kentucky DPA, Erlanger, Ky. (June 13, 2006).

Training: Immigration Consequences of Crime, Kentucky DPA, Louisville, Ky. (June 20, 2007).

Training: Representing the Non-English Speaking Client, Legislative Research Commission, Frankfurt, Ky. (June 29, 2005).

Training: How to Work with Immigrants in the Criminal Justice System, Kentucky DPA, Lexington, Ky. (2008).

Training: Help! I Have Aliens in My Office! Immigration Law Basics for a General Practice, Kentucky Bar Association, Covington, Ky. (June 10, 2009) (scheduled).

Louisiana

Training: The Rings of Immigration Hell: The Collateral Consequences of Criminal Conduct to Aliens, Louisiana Association of Criminal Defense Lawyers (April 28, 2007).

Maryland

Only a Misdemeanor? For Non-US Citizens Facing Criminal Charges, the Stakes Are Often Much Higher, Maryland Bar Bulletin, Immigration Law (Sept. 2004).

Abbreviated Chart for Criminal Defense Practitioners of the Immigration Consequences of Criminal Convictions Under Maryland State Law (Maryland Office of the Public Defender & University of Maryland School of Law Clinical Office, 2005-2008).

Training: Immigration Consequences of Criminal Convictions, Defending Immigrants Partnership, Baltimore, Md. (Nov. 2003).

Training: What Every Maryland Criminal Defense Attorney Should Know About Immigration, Maryland Office of the Public Defender *et al.* (Sept. 19-Oct. 24, 2007).

Massachusetts

Dan Kesselbrenner & Wendy Wayne, *Selected Immigration Consequences of Certain Massachusetts Offenses* (National Immigration Project, 2006).

Wendy Wayne, *Five Things You Must Know When Representing Immigrant Clients* (2008).

Training: Immigration Consequences of Criminal Convictions, Essex County Defenders, Essex County, Mass. (Oct. 1, 2005).

Training: Immigration Consequences of Criminal Conduct: Overview of Concepts & Discussion of Emerging Issues, Massachusetts Bar Association (Feb. 12, 2009).

Michigan

David C. Koelsch, *Proceed with Caution: Immigration Consequences of Criminal Convictions*, 87 Mich. B.J. 44 (Nov. 2008).

David Koelsch, *Immigration Consequences of Criminal Convictions (Michigan Offenses)*, U. Det. Mercy School of Law (2008)

Training: Immigration Consequences of Criminal Convictions, Criminal Defense Attorneys of Michigan (Spring & Fall 2008)

Training: Immigration Consequences of Criminal Convictions, Michigan State Appellate Defender Office, Dearborn, Mich. (May 14, 2008)

Minnesota

Maria Baldini-Potermin, *Defending Non-Citizens in Minnesota Courts: A Practical Guide to Immigration Law and Client Cases*, 17 Law & Ineq. 567 (1999).

Dinesh Shenoy & Salima Oines Khakoo, *One Strike & You're Out! The Crumbling Distinction Between the Criminal & the Civil for Immigrants in the Twenty-First Century*, 35 Wm. Mitchell L. Rev. 135 (2008).

Training: Immigration and Criminal Defense Strategies: How to Keep Your Client from Being Deported (What Every Immigration Lawyer Needs to Know About Criminal Cases & "Visa" Versa), Minnesota State Bar Association (Dec. 14, 2006).

Montana

Training: Basics of Immigration Law for Criminal Defense Lawyers, Montana Association of Criminal Defense Lawyers (Aug. 10, 2007).

Nebraska

Training: The Immigration Consequences of Criminal Convictions, Nebraska. State Bar Association (online seminar) (Mar. 19, 2004).

Nevada

Charles Bennion, *Important Immigration Issues*, 7 Nev. Law. 11 (Nov. 1999).

Steve Brazelton, *Immigration Pitfalls of the Plea Bargain: Criminal Attorneys Beware*, 7 Nev. Law. 13 (Nov. 1999).

Training: Immigration Consequences of Criminal Convictions, Washoe County Public Defenders Office, Reno, Nev. (2007).

New Jersey

Joanne Gottesman, *Quick Reference Chart for Determining the Immigration Consequences of Selected New Jersey Criminal Offenses* (2003-2008).

William E. McAlvanah, *Strategies for Avoiding Adverse Immigration Consequences When Representing Foreign-Born Defendants*, 227 N.J. Law. 30 (Apr. 2004).

Training: Immigration Consequences of Criminal Convictions, New Jersey Office of the Public Defender & New Jersey Association of Criminal Defense Lawyers, Camden, N.J. (March 7, 2003).

Training: Immigration Consequences of N.J. Criminal Dispositions, New Jersey Office of the Public Defender et al., Trenton, N.J. (Jan. 29, 2008).

New Mexico

Jacqueline Cooper, *Reference Chart for Determining Immigration Consequences of Selected New Mexico*

Criminal Offenses, New Mexico Criminal Defense Lawyers Association (July 2005).

Training: Immigration Consequences of Criminal Convictions, New Mexico Criminal Defense Lawyers, Las Cruces, N.M. (Sept. 13, 2002).

Training: Immigration Consequences of Criminal Convictions, New Mexico State Public Defender Seminar (Oct., 2003)

Training: Immigration Consequences: How to Keep a Minor Conviction from Triggering Lifelong Banishment to a Foreign Country, New Mexico Criminal Defense Lawyers (June 13, 2008)

New York

Criminal Immigration Practice Tips for Criminal Defense Attorneys (Immigrant Defense Project, 1997-2009).

Manuel D. Vargas, *Representing Immigrant Defendants in New York, including a Quick Reference Chart for New York Offenses* (Immigrant Defense Project et al, 1998-2006).

Training: Immigration Consequences of New York Criminal Dispositions, New York State Defenders Association, Albany, N.Y. (May 16-17, 2003).

Training: Immigration Consequences of Criminal Dispositions, New York State Association of Criminal Defense Lawyers (Sept. 2004).

North Carolina

Sejal Zota & John Rubin, *Immigration Consequences of a Criminal Conviction in North Carolina* (Office of Indigent Defense Services, 2008).

Training: Immigration Consequences of Convictions, North Carolina Prisoner Legal Services (2002).

Training: Advising Non-citizen Defendants of the Immigration Consequences of Crime, Mecklenburg County Public Defender's Office, Charlotte, N.C. (Oct. 25, 2007).

North Dakota

Training: Immigration Consequences of Crimes, National Immigration Project, Grand Forks, N.D. (March 2, 2007).

Ohio

Karen D. Bradley, *Ten Things a Criminal Defense Attorney Should Know When Representing the Non-Citizen in Criminal Proceedings*, 34 U. Dayton L. Rev. 35 (2008).

Training: Immigration Consequences of State Criminal Convictions, Franklin County Public Defender, Columbus, Ohio (June 4, 2008).

Training: Immigration Consequences of Criminal Convictions & Removal (Deportation) & Inadmissibility, Ohio State Bar Association (March 17, 2009).

Oklahoma

Trainings: Immigration Consequences of Criminal Convictions, Oklahoma State Bar Association (Nov. 8, 2002, Oklahoma City, OK; April 20, 2006, Tulsa, OK; April 2, 2009, Tulsa, OK).

Oregon

Steve Manning, *Immigration Consequences of Common Criminal Prosecutions* (Oregon Chapter of American Immigration Lawyers Association, 2009).

Training: Immigration Consequences of Criminal Convictions, Oregon AILA Chapter (Oct. 20, 2006).

Pennsylvania

Training: Dealing with Common Immigration Problems in Criminal Cases, Pennsylvania Bar Institute (available online) (June 8, 2007).

Training: Immigration Consequences of Criminal Convictions, Pennsylvania Association of Criminal Defense Lawyers (2008).

Rhode Island

Trainings: Food for Thought – The Immigration Consequences of Criminal Convictions, Rhode Island Bar Association (Sept. 26 & Oct. 11, 2007).

South Carolina

Allen C. Ladd, *Protecting Your Non-Citizen Client from Immigration Consequences of Criminal Activity*, 15 S. Carolina Law. 38 (May 2004).

Training: Representing Foreign Nationals in Family & Criminal Court, South Carolina Bar, Columbia, SC (live and webinar access) (July 25, 2008).

Tennessee

Michael C. Holley, *Guide to the Basic Immigration Consequences of Select Tennessee Offenses* (2008).

Michael C. Holley, *Immigration Consequences: How to Advise Your Client* (Tennessee Association of Criminal Defense Law).

Training: What Criminal Defense Attorneys Need to Know About Immigration, Tennessee Association of Criminal Defense Lawyers (Nov. 7, 2003).

Training: The Long Road for the Short and Quick Plea: How the Easy Plea in Criminal Court Can

Permanently Ruin Your Immigrant Client's Life, Tennessee Bar Association (Feb. 2009).

Texas

Brian Bates, *Good Ideas Gone Bad: Plea Bargains & Resident Aliens*, 66 Tex. Bar J. 878 (Nov. 2003)

Immigration Consequences of Selected Texas Offenses: A Quick Reference Chart (2004-2006).

Training: Immigration Consequences of Convictions & Sentences (Focus on Texas & Fifth Circuirt), Defending Immigrants Partnership, San Antonio, Tex.(Sept. 24, 2004).

Training: Immigration Convictions & Collateral Consequences, Texas State Bar (July 2008).

Utah

Hakeem Ishola, *Of Convictions & Removal: The Impact of New Immigration Law on Criminal Aliens*, 10 Utah B.J. 18 (Aug. 1997).

Vermont

Rebecca Turner, *Immigration Consequences of Select Vermont Criminal Offenses Reference Chart* (2005-2006).

Rebecca Turner, *A Brief Guide to Representing Non-Citizen Criminal Defendants in Vermont* (2005).

Training: Immigration Consequences Session, State Defender Training, Burlington, Vt. (June 6, 2002).

Training: Preventing, Reducing or Eliminating The Immigration Consequences of Criminal Convictions, Vermont Bar Association (Sept. 23, 2004).

Virginia

Mary Holper, *Reference Guide and Chart for Immigration Consequences of Select Virginia Criminal Offenses* (2007).

Training: Immigration Consequences of Criminal Convictions Training for Fairfax County Public Defenders, Fairfax, Va. (May 1, 2004).

Training: Immigration Consequences of Criminal Convictions in Virginia, Virginia State Bar (March 27, 2007).

Washington

Ann Benson et al., *Immigration & Washington State Criminal Law, including RCW Quick Reference Chart for Determining Immigration Consequences of Selected Washington State Offenses* (Washington Defender Association Immigration Project, 2001-2005).

Ann Benson *et al.*, *Crafting Pleas For Non-citizen Defendants: What Every Defender Needs To Know* (WDA Immigration Project, 2007).

Training: Immigration Law & Crimes, The Defender Association in Seattle, King County, WA (March 21, 1996).

Training: On Immigration Consequences of Criminal Convictions, Washington State Defender Association, Seattle, WA (March 10-11, 2005).

Wisconsin

Wisconsin State Public Defender, *Quick Reference Chart – Immigration Consequences of Select Wisconsin Criminal Statutes.*

Training: Crimes & Immigration Law, State Bar of Wisconsin (available online) (Oct. 20, 2005).

Wyoming

Training: Crimes & Immigration: Preventing Removal and Preserving Relief Pre-and Post-Conviction, Wyoming State Bar (online seminar) (Jan. 12, 2008).

Training: Immigration Basics and New Developments – Immigration Consequences of Criminal Convictions, Wyoming State Bar (online seminar) (April 14, 2009).

Federal Resources

Dan Kesselbrenner & Sandy Lin, *Selected Immigration Consequences of Certain Federal Offenses* (National Immigration Project, 2005).

Trainings: Sample National and Regional Trainings on Immigration Consequences of Criminal Convictions, Administrative Office of the United States Courts (Savannah, Ga., Jun. 3-5, 1999; St. Thomas, V.I., Apr. 27, 2000; New Orleans, La., Jun. 6, 2000; Scottsdale, Ariz., Sept. 18-20, 2003; Los Angeles, Cal., Sept. 4-5, 2008).

APPENDIX D: RESOURCES AVAILABLE TO CRIMINAL DEFENSE ATTORNEYS IN THE 50 STATES AND D.C. SINCE 1996

State	Written resources available (national or state) (See App. C)	Training in state (See App. C)	Nat'l training available (See App. C)	Free or low cost expert advice available (See Brief pp. 25-29)
AK	X	X	X	X
AL	X	X	X	X
AR	X (including state resources)		X	X
AZ	X (including state chart & resources)	X	X	X
CA	X (including state chart & resources)	X	X	X
CO	X (including state resources)	X	X	X
CT	X (including state chart & resources)	X	X	X
DC	X (including D.C. resources)	X	X	X
DE	X	X	X	X
FL	X (including state chart & resources)	X	X	X

State	Written resources available (national or state) (See App. C)	Training in state (See App. C)	Nat'l training available (See App. C)	Free or low cost expert advice available (See Brief pp. 25-29)
GA	X (including state resources)	X	X	X
HI	X	X	X	X
IA	X (including state chart & resources)	X	X	X
ID	X	X	X	X
IL	X (including state chart)	X	X	X
IN	X (including state resources)	X	X	X
KS	X (including state resources)		X	X
KY	X (including state resources)	X	X	X
LA	X	X	X	X
MA	X (including state chart & resources)	X	X	X
MD	X (including state chart & resources)	X	X	X
ME	X		X	X

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State	Written resources available (national or state) (See App. C)	Training in state (See App. C)	Nat'l training available (See App. C)	Free or low cost expert advice available (See Brief pp. 25-29)
MI	X (including state chart & resources)	X	X	X
MN	X (including state resources)	X	X	X
MO	X		X	X
MS	X		X	X
MT	X	X	X	X
NC	X (including state chart & resources)	X	X	X
ND	X	X	X	X
NE	X	X	X	X
NH	X		X	X
NJ	X (including state chart & resources)	X	X	X
NM	X (including state chart & resources)	X	X	X
NV	X (including state resources)	X	X	X
NY	X (including state chart & resources)	X	X	X

State	**Written resources available (national or state)** (See App. C)	**Training in state** (See App. C)	**Nat'l training available** (See App. C)	**Free or low cost expert advice available** (See Brief pp. 25-29)
OH	X (including state resources)	X	X	X
OK	X	X	X	X
OR	X (including state resources)	X	X	X
PA	X	X	X	X
RI	X	X	X	X
SC	X (including state resources)	X	X	X
SD	X		X	X
TN	X (including state resources)	X	X	X
TX	X (including state chart)	X	X	X
UT	X (including state resources)		X	X
VA	X (including state chart)	X	X	X
VT	X (including state chart)	X	X	X
WA	X (including state chart & resources)	X	X	X

State	Written resources available (national or state) (See App. C)	Training in state (See App. C)	Nat'l training available (See App. C)	Free or low cost expert advice available (See Brief pp. 25-29)
WI	X (including state resources)	X	X	X
WV	X		X	X
WY	X	X	X	X
Total	50 (plus D.C.)	At least 41* (plus D.C.)	50 (plus D.C.)	50 (plus D.C.)

* The list of trainings is Appendix C is a partial list only and may not include trainings in additional states.